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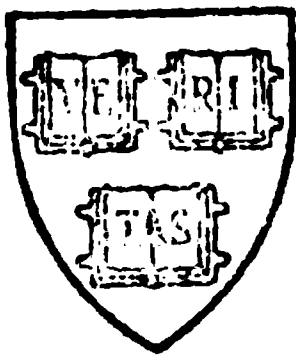
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VOL. 1--ILLINOIS APPELLATE
REPORTS.

REPORTS
OF
THE DECISIONS
OF THE
APPELLATE COURTS
OF THE
STATE OF ILLINOIS.

BY
JAMES B. BRADWELL.

VOL. I.—1877-1878.

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CHICAGO LEGAL NEWS COMPANY.

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OFFICERS OF THE APPELLATE COURTS OF ILLINOIS

FROM THEIR ORGANIZATION.

FIRST DISTRICT.

W. W. HEATON,* *Presiding Judge*, Dixon.
THEODORE D. MURPHY, *Presiding Judge*, Woodstock.
GEORGE W. PLEASANTS, } Rock Island.
JOSEPH M. BAILEY, ✓ } *Judges* Freeport.
ELI SMITH, *Clerk*, Chicago.
JAMES B. BRADWELL, *Reporter*, Chicago.

SECOND DISTRICT.

EDWIN S. LELAND, *Presiding Judge*, Ottawa.
JOSEPH SIBLEY, } Quincy.
NATHANIEL J. PILLSBURY, } *Judges* Pontiac.
C. D. TRIMBLE, *Clerk*, Ottawa.

THIRD DISTRICT.

CHAUNCEY L. HIGBEE, ✓ *Presiding Judge*, Pittsfield
OLIVER L. DAVIS, } Danville.
LYMAN LACY, ✓ } *Judges* Havana.
E. C. HAMBURGER, *Clerk*, Springfield.

FOURTH DISTRICT.

TAZEWELL B. TANNER, *Presiding Judge*, Mount Vernon.
DAVID J. BAKER,† } Cairo.
JAMES C. ALLEN, ✓ } *Judges* Palestine.
GEORGE W. WALL, } DuQuoin.

*Deceased.

†Appointed Judge of the Supreme Court.

TABLE OF CASES.

TITLE OF CASE.	SUBJECT.	PAGE.
A		
Augustine v. Doud.....	<i>Foreclosure—Parties</i>	588
Ayres v. Hawks.....	<i>Wife—Homestead waiver</i>	600
B		
Bannon v. The People.....	<i>Confession of judgment</i>	496
Bayard v. McGraw.....	<i>Mechanic's lien—Parties</i>	134
Beach v. Jeffrey.....	<i>Tender</i>	283
Beveridge v. Chetlain.....	<i>Practice—Burnt records</i>	231
Bolton v. Board of Education.....	<i>Municipal bonds</i>	193
Breaton v. Johnson.....	<i>Practice—Sci. fa.</i>	160
Brown v. Luehrs	<i>Impeaching witness</i>	74
Burritt v. Tidmarsh.....	<i>Evidence—Preponderance</i>	571
C		
C. B. & Q. R. R. Co. v. Boger.....	<i>Expulsion from train</i>	472
C. B. & Q. R. R. Co. v. Hoyt.....	<i>Connection with warehouse</i>	374
C. B. & Q. R. R. Co. v. Sykes.....	<i>Contributory negligence</i>	520
City of Chicago v. Gavin.....	<i>Negligence—Liability of city</i>	302
City of El Paso v. Causey.....	<i>Contributory negligence</i>	531
City of Joliet v. Tuohey.....	<i>Fees of collector</i>	483
City of Mendota v. Fay.....	<i>Due care—Proof required</i>	418
Clark v. Gotts.....	<i>Parent and child—Support</i>	454
Convey v. Sheldon.....	<i>Recovery of interest—Rate</i>	555
C. R. I. & P. R. R. Co v. Dingman.....	<i>Alighting from cars</i>	162
D		
Davison v. Hill.....	<i>Contract—Rescission</i>	70
Dunton v. Chamberlain.....	<i>Gratuitous services</i>	361
Dupue v. McCausland.....	<i>Pleading—Variance</i>	395
E		
Empire Fire Ins. Co. v. Real Estate		
Co.....	<i>Amending pleas</i>	391
Evans v. Gage	<i>Collection of tax</i>	202

TITLE OF CASE.	SUBJECT.	PAGE.
F		
Fabbri v. Cunio.....	<i>Appeal from justice</i>	240
Feldman v. City of Morrison	<i>Dram shop law</i>	460
Forrester v. Oliver	<i>Surviving partner—Liability</i>	259
Fox v. Turner	<i>Offer—Acceptance</i>	153
Fuller v. Heath.....	<i>City Certificates</i>	118
G		
Garland v. Peeney	<i>Coverture—Promise by wife</i>	108
Gault v. Babbitt	<i>Libel—Justification</i>	1: 0
Glenn v. Kays	<i>Trespass</i>	479
Gottfried v. German Nat. Bank ...	<i>Affidavit of claim</i>	224
Gormley v. Uthe	<i>Five-day rule</i>	170
Guill v. Hannay.....	<i>Married women—Separate property</i>	490
H		
Harms v. Fitzgerald.....	<i>Power of Co. Comr's</i>	325
Harms v. Sullivan.....	<i>Injury to employee</i>	251
Hayward v. Catton.....	<i>Evidence—Instructions</i>	577
Heath v. Jones.....	<i>Evidence—Conflict in</i>	256
Hildreth v. Heath	<i>Mandamus—Pardon</i>	82
Humboldt Ins. Co. v. Johnson.....	<i>Insurance policy</i>	309
J		
Jefferson v. Barkto	<i>Chattel mortgage</i>	568
Johnson v. Breaton.....	<i>Payment—Burden of proof</i>	293
K		
Kappes v. Geo. E. White Co.....	<i>Payment by note—Merger</i>	280
Kelderhouse v. Saveland.....	<i>Executory contract—Damages</i>	65
Kent v. Mason	<i>Evidence</i>	466
Kimball v. Corn Exchange Bank....	<i>Illegal tax</i>	209
L		
Lawrence v. Atwood.....	<i>Broker's commissions</i>	217
Lill v. Brant.....	<i>Statute limitations</i>	266
M		
Mattingly v. Obley.....	<i>Husband and Wife</i>	626
McBean v. Fox.....	<i>Deceit</i>	177
McCoy v. Appleby Mf 'g Co.....	<i>Corporate purpose</i>	78
McCoy v. Babcock.....	<i>Days of grace</i>	414
McElhaney v. The People.....	<i>Evidence—Preponderance</i>	550
McLaughlin v. Gilmore.....	<i>Attorney's privilege</i>	563
M. C. R. R. Co. v. C. & M. L. S. R. R. Co.	<i>Garnishment</i>	399
Miller v. Excelsior Stone Co.....	<i>Bill of exchange</i>	273
Mitchell v. McNab	<i>Parol contract</i>	297
Morris v. Gleason	<i>Injury to employee</i>	510

TABLE OF CASES.

11

TITLE OF CASE.	SUBJECT.	PAGE.
N		
Nelson v. Akeson.....	<i>Practice—Amendments</i>	165
Noy v. Creed.....	<i>Sale of liquor</i>	557
Nelson v. McIntyre.....	<i>Replevin</i>	603
O		
O. O. & F. R. V. R. R. Co. v. Hall..	<i>Subscription</i>	612
O. O. & F. R. V. R. R. Co. v. McMath.	<i>Evidence</i>	429
Orr v. Jason.....	<i>Evidence—Instructions</i>	439
P		
Pease v. Catlin.....	<i>New promise—Evidence</i>	88
Pease v. Underwriters' Union.....	<i>Liability of stockholder</i>	287
Peck v. Standart.....	<i>Mechanic's lien</i>	228
Pennsylvania Co. v. Sloan.....	<i>Statute of Limitations</i>	364
Pfirmann v. Henkel.....	<i>Limited partnership</i>	145
Phil. Fire Ins. Co. v. Cent. Nat. Bank.	<i>Creditor's Bill</i>	344
Phillips v. Phillips.....	<i>Divorce—Condonation</i>	245
Pilgrim v. Mellor.....	<i>Local action—Venue</i>	448
R		
Race v. Sullivan.....	<i>Mechanic's lien</i>	94
Rauh v. Ritchie.....	<i>Distress for rent</i>	188
Rees v. Peltzer.....	<i>Suit on bond</i>	315
Rogers v. Powell.....	<i>Mechanic's Lien</i>	631
S		
Sea v. Glover.....	<i>Promissory note—Guaranty</i>	335
Smith v. Kinkaid.....	<i>Practice—Instructions</i>	620
Smith v. Lozano.....	<i>Suit on bond—Estoppel</i>	171
Stein v. Kendall.....	<i>Filing bill of exceptions</i>	101
Stein v. Kendall.....	<i>Special contract—Evidence</i>	103
Stilson v. Harger.....	<i>Evidence—Preponderance</i>	584
Sturgeon v. Burrall.....	<i>Bill in equity</i>	537
T		
Teessen v. Camblin.....	<i>Statute of Limitations</i>	424
Thompson v. Scott.....	<i>Vendor's Lien</i>	641
Town of LaSalle v. Blanchard.....	<i>Fees of high'y com'r</i>	635
V		
Vanderslice v. Mumma.....	<i>Tenancy—Trespass</i>	434
Village of South Evanston v. Lynch.	<i>Instructions</i>	63
W		
Walker v. Ensign.....	<i>Judgment by confession</i>	113
Walsh v. Truesdell.....	<i>Foreclosure—Parties</i>	126
Weaver v. Halsey.....	<i>Master and servant</i>	558
Willett v. Woodhams.....	<i>Com'rs of highways</i>	411
Wadleigh v. Develling.....	<i>Protection of tumbling-rods</i>	596

PROCEEDINGS
UPON THE DEATH OF
HON. W. W. HEATON, PRESIDING JUDGE,

**HAD AT A MEETING OF THE BAR, AND IN THE APPELLATE COURT,
AT CHICAGO, AT THE**

APRIL TERM, A. D. 1878.

At a meeting of the Chicago Bar, held at the Appellate Court rooms, in Chicago, on the 30th day of December, for the purpose of expressing their respect and esteem for the memory, and testifying their regret at the sudden death of the Hon. W. W. HEATON, late Presiding Judge of this Court, the following resolutions were unanimously adopted:

WHEREAS, In the Providence of God, the judiciary and bar of the State of Illinois are called upon to mourn the sudden death of the Hon. WILLIAM W. HEATON, Chief Justice of the Appellate Court of the First District; therefore,

Resolved, That while we deplore our loss, wherein our judiciary have been deprived of the services of an honorable and eminent member, the bar the example of an upright Judge, and the State at large the benefit of the wisdom and help of an esteemed and honored citizen, we yet feel that we are left an example worthy of imitation that will be of value to those remaining and seeking an honorable place in the profession he adorned.

Resolved, That the bar of the First District hereby express to the members of the family of our deceased brother, so sadly afflicted, our most heartfelt sympathy and condolence in this their time of sorrow, while we reverently commit them and their cause to that God in whom our brother trusted, and who "doeth all things well," for such consolation and support as they need, and the Divine Father above can fully bestow.

Proceedings upon the Death of Judge Heaton.

Resolved, That a copy of these resolutions be transmitted to the family, as an expression of our esteem for him whom they loved, and our sympathy with them ; and also that the same be published and presented by appropriate committees to the proper courts of our district and State.

Mr. A. McCoy, who had been appointed to present these resolutions to the Appellate Court, after the reading said :

In pursuance of an order of said meeting, I now present these resolutions to this Court, with the request that they be entered upon its records.

Both precedent and the occasion will justify me in adding a few words to what is expressed in these resolutions.

The high position of JUDGE HEATON as a jurist, his long and valued labors of thirty years in the profession in this State, his purity of character, demand of us something more than the mere recording and filing of these resolutions among the archives of this Court.

He came among us, so far as personal acquaintance is concerned, almost a stranger. But his frankness, his candor, his kind and genial countenance, and his simplicity and directness of expression, as the presiding officer of this Court, soon commanded the confidence, esteem, and affection of all.

His advancement in the profession was slow, but healthy, sure and permanent. First as the private soldier, he served for years in the rank and file of the profession ; then his natural love for the broad principles of equity, schooled, cultured and disciplined, by a most scrupulously honorable practice of his profession, called him to preside upon the circuit bench. How well he discharged these judicial duties, let the universal regret of the people of his circuit, at his departure, and the unsullied ermine worn by him for near a score of years, answer.

The selection of JUDGE HEATON as one of the members of this court was so eminently proper, that it was sanctioned and approved by all who knew him, and his appointment to preside, as Chief Justice thereof, added another testimonial to the dignity, honor and discrimination of the legal profession. It was an acknowledgment of genuine merit.

The short term in which he presided over the deliberations of

Proceedings upon the Death of Judge Heaton.

this Court was marked by such fairness of manner, kindness of demeanor and courteous conduct, that not a sting was left behind.


He left us just as we were beginning to know him. A worker in the profession, he was stricken down in an instant ; but like a true soldier, he fell with his armor on.

We do not desire to pass any fulsome or flattering eulogy upon our departed brother. It would be inconsistent with his simple, pure, truthful, and unostentatious life. But I believe that the feelings and sentiments of worth concerning the deceased, expressed in these resolutions, will find an echo in the hearts of all who enjoyed the pleasure and honor of his acquaintance.

Stricken down suddenly, in the maturity of his intellect, with the ripe experience of a noble manhood ; having given his life to the profession he so well adorned, he “ now reposes quietly and silently in his last resting place, without a blot upon his fair fame, or a stain upon his memory.”

I now formally move the Court that the resolutions be entered upon its records.

PRESIDING JUDGE MURPHY, at the conclusion of the remarks of Mr. McCoy, said : In ordering the resolutions of the Bar of Chicago to be spread upon the records of this Court, it affords the Court great pleasure to cordially unite its voice with them in attesting its high respect for and appreciation of the character of our deceased friend and brother, JUDGE HEATON, late Chief Justice of this Court. For so able, useful and distinguished citizen to be stricken down in the prime of life, and in the midst of his usefulness is, indeed, a sad providence. Although our association, incident to the organization of the Court, was of brief duration, being for a few weeks only, it served to endear him to his surviving brethren, and make the bereavement to them a personal one. In the important work of organizing the Court, and the performance of its duties, his great and varied learning and good judgment were invaluable. His character as a judicial officer furnishes an exalted example for his successors to imitate.



RULES OF PRACTICE
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT

ADOPTED AUGUST 1ST, 1878.

It is hereby ordered that all the rules of practice heretofore adopted and established by this Court be, and the same are hereby, set aside, annulled and vacated, and that the following rules, numbering consecutively from one to thirty-eight, be, and they are hereby, adopted, ordered and established for the regulation of the practice and proceedings of this Court, and for the keeping of the dockets and records thereof, and it is ordered that said rules be entered of record by the Clerk of this Court.

I.

WRITS OF ERROR AND SUPERSEDEAS.

No supersedeas will be granted, unless a transcript of the record on which the application is made be complete, and so certified by the clerk of the court below, and the requisite bond be entered into and filed in the office of the clerk of this Court, according to law, with an assignment of errors written on or appended to the record. And on every application for a supersedeas, an abstract of the record, with a brief containing the points and authorities relied upon, and pointing specifically to those portions of the record upon which the alleged errors arise, with the record, shall be presented to the court or judge to whom the application is made. Every such application, whether made in open court or to a justice in vacation, must be accompanied by an affidavit of the proposed securities, or some other credible person, justifying the sufficiency of bail, sworn to and properly certified.

Rules of Practice.

II.

BOND.

Whenever a bond is executed by an attorney in fact, the clerk shall require the original power of attorney to be filed in his office, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question ; in which case the original power of attorney shall be presented to the clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

III.

FORM OF WRIT WHEN A SUPERSEDEAS.

When a writ of error shall be made a supersedeas, the clerk shall indorse upon said writ the following words : " This writ of error is made a supersedeas, and is to be obeyed accordingly," and he shall thereupon file the writ of error, with the transcript of the record, in his office. Said transcript shall be taken and considered as a due return to said writ, and thereupon it shall be the duty of the clerk to issue a certificate, in substance as follows, to wit :

STATE OF ILLINOIS, ss.

OFFICE OF THE CLERK OF THE }
APPELLATE COURT OF THE FIRST DISTRICT. }

I do hereby certify, that a writ of error has issued from this Court for the reversal of a judgment obtained by.....v.....in the Court of....., at the.....term, A. D. 18. . . , in a certain action of. , which writ of error is made a supersedeas, and is to operate as a suspension of the execution of the judgment, and, as such, is to be obeyed by all concerned.

Given under my hand and the seal of the Appellate Court of the First District, at , this. . . . day of. , A. D. 18. . . .

....., *Clerk.*

IV.

TO WHOM DIRECTED.

Writs of error shall be directed to the clerk or keeper of the record of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this Court ; but where the plaintiff in error shall file in the office of the clerk of this Court a transcript of the record, duly certified to be full and complete, before a writ of error issues, it

Rules of Practice.

shall not be necessary to send such writ to the clerk of the inferior court, but such transcript shall be taken and considered as a due return to said writ.

V.

PROCESS—WRITS OF ERROR.

The process on writs of error shall be a *scire facias* to hear errors, issued on the application of the plaintiff in error to the clerk, directed to the sheriff, or other officer of the proper county, commanding him to summon the defendant in error to appear in Court, and show cause, if any he have, why the judgment or decree mentioned in the writ of error shall not be reversed. If the *scire facias* be not returned executed, an *alias* and *pluries* may issue without an order of Court.

VI.

RETURN DAY.

The first day of each term shall be return day, for the return of process. And no party shall be compelled to answer or prepare for hearing, unless the *scire facias* shall have been served ten days before the return day thereof; nor shall a defendant be at liberty to enter his appearance and compel the plaintiff to proceed with the cause, unless he shall have given the plaintiff ten days' notice, before the term, of his intention to enter his appearance and have the cause proceed to a hearing.

VII.

SCIRE FACIAS TO HEAR ERRORS—NOTICE—CONTINUANCE.

In all cases in which a writ of error is made a supersedeas, the plaintiff in error shall, on filing the record with the clerk, at the same time, order and direct a *scire facias* to issue to hear errors, and shall use reasonable diligence to have the same served ten days before the first day of the term to which the writ of error is made returnable; on failing to do so, the defendant in error shall have the right to a hearing at the said term, after joining in error, without giving ten days' notice, as required by Rule VI: *Provided*, If there be not ten days between the allowance of the supersedeas and the sitting of the Court, the cause shall stand con-

Rules of Practice.

tinued until the next term, unless by consent of parties it shall be otherwise ordered.

VIII.

NOTICE TO PURCHASERS AND TERRE-TENANTS.

In all cases wherein guardians, executors or administrators, or others acting in a fiduciary capacity, having obtained an order or decree for the sale of lands in causes *ex parte*, and a sale has been had under such decree or order, and the same shall be brought to this Court for revision, the purchaser or *terre-tenants* of such lands, if known, shall be suggested to the Court by affidavit of the plaintiff in error, and notice given them of the pendency of the writ of error ten days before the first day of the term of the Court to which the writ of error is returnable, so that said *terre-tenants* may appear and defend.

IX.

RECORDS FROM COURTS BELOW—HOW PREPARED.

Hereafter, in cases of appeal and of error in making up “an authenticated copy of the record of the judgment appealed from,” or in sending up a transcript of the record to this Court as a return to a writ of error, the clerk of the court from which such appeal or writ of error is prosecuted shall certify to this Court—first, a copy of the process and return; second, the pleadings of the parties, respectively; third, the verdict in jury trials; fourth, the judgment of the court below, whether tried by the court or jury; fifth, all orders in the same cause made by the court; sixth, the bill of exceptions; and, seventh, the appeal bond in cases of appeal. And in no case shall the said clerk insert in such transcript any affidavit, account or other document or writing, or other matter, which by law constitutes no part of the record of a cause. This rule shall not extend to appeals or writs of error in chancery or criminal causes.

X.

ASSIGNMENT OF RECORD BY CLERK—COSTS.

The clerk of the court below shall arrange the several parts of the record aforesaid, according to their chronological order. The clerk of this Court shall not tax as costs in this Court any matter inserted in such transcript contrary to the last preceding rule.

Rules of Practice.

XI

PRÆCIPE.

The party or his attorney may, by *præcipe*, indicate to the clerk, and direct what of the files of the cause shall be copied into the record ; and in such case, if the record shall be insufficient, it shall be supplied at his costs, and, if unnecessarily voluminous, he shall pay the costs accrued on account of the copying of such unnecessary matters.

XII.

TIME FOR FILING RECORDS—HEARING DOCKET.

No case brought to this Court by appeal, shall be placed on the Court docket for hearing, unless the record is filed within the time now prescribed by law, or within the further time allowed by the Court for filing the record, except in extraordinary cases, the Court, upon special application, may order a cause to be placed on the hearing docket.

XIII.

No case which may be brought to this Court on writ of error shall be placed on the Court docket for hearing, unless the record shall be filed on or before the second day of the term, or within such further time as may be allowed by the Court for filing the same, except in extraordinary cases, the Court, upon special application, may order a cause to be placed on the hearing docket.

XIV.

REMOVING RECORDS.

No person shall remove from the office of the Clerk any record of this Court, except upon special leave granted for that purpose. No record shall be taken from the files of the Court, except on application therefor to the Clerk or his deputy ; and it is made the duty of the Clerk to report promptly to the Court every violation of this rule. The Clerk shall be held responsible for the safe keeping and production of the records. Applications for leave to remove records may be considered at any time, in the discretion of the Court.

Rules of Practice.

XV.

ASSIGNMENTS OF ERROR.

The appellant or plaintiff in error shall, in all cases, assign errors at the time of filing his record in this Court, and on failing to do so, the case may be dismissed ; but other errors may be assigned after the filing of the record, by leave of the Court. The appellee or defendant in error shall have the right to assign cross-errors for two days after the expiration of the time within which the record is required by law to be filed in this Court, and not afterwards without special leave of the Court. The assignment of errors and cross-errors must be written upon or attached to the record.

XVI.

AGREED CASES.

No judgment shall be pronounced in any agreed case placed upon the records of this Court unless an affidavit shall be filed, setting forth that the matters presented by the record were litigated in good faith, about a matter in actual controversy between the parties, and that the opinion of this Court is not sought with any other design than to adjudicate and settle the law relative to the matter in actual controversy between the parties to the record.

XVII.

MOTIONS.

Motions may be made at the opening of Court each day immediately after the decisions of the Court are announced, but at no other time, unless in case of necessity, or in relation to a cause when called in course. Motions for orders of course will be entered by the Clerk, with orders of course made thereon, viz: for hearing, taking under advisement and entering decision, in such manner that a perfect record may be kept of each step in the cause.

XVIII.

SPECIAL MOTIONS—OBJECTIONS.

All special motions shall be in writing and filed with the Clerk, together with the reasons in support thereof, and a copy of said motion, and also of the affidavits on which the same is founded

Rules of Practice.

shall be served on the opposite party or his attorney, at least one day before they shall be submitted to the Court. Objections to motions must also be in writing.

XIX.

WHEN TO BE SUPPORTED BY AFFIDAVIT.

When a motion is intended to be based on matters which do not appear by the record, the facts must be disclosed and supported by affidavit.

XX.

SECURITY FOR COSTS.

Upon filing an affidavit that any plaintiff in error is not a resident of this State, and that no bond for costs has been filed, a rule will be entered against him, of which he shall take notice, to show cause why the writ shall not be dismissed.

XXI.

ABSTRACTS.

In all cases, the party bringing a cause into this Court shall furnish a complete abstract or abridgment of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstract to be printed in a neat and workmanlike manner, with small-pica type and leaded lines, on one side only, upon white foolscap paper, leaving a margin at least two inches in width on the left-hand side of each sheet. Six copies of such printed abstract shall be filed in each case, one for each of the justices, one for the defendant in error or appellee, and two to be filed with the record.

XXII.

FURTHER ABSTRACTS

The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment furnished by the plaintiff's counsel, to file and to furnish each of the justices of this Court with such further abstracts as he shall deem necessary to a full understanding of the merits of the cause.

Rules of Practice.

XXIII.

BRIEFS.

Printed briefs will be required in all causes, whether argued orally, in full or in part only, or when submitted on briefs without oral argument. The briefs required should contain a short, clear statement of the points, and the authorities in support thereof; and in citing cases from published reports, counsel will be required not only to give the book and page, but also the names of the parties as they appear in the title of the reported case; and the names of counsel filing brief or abstract must appear to the same. But the filing of a printed brief shall not preclude the party from filing full printed or written arguments in support of his brief of points and authorities, provided he does so within the time his printed brief is required to be filed.

XXIV.

NUMBER OF COPIES.

Six copies of the briefs must be filed in each case, one for each of the justices, one for the opposite party, and two to be filed with the record.

XXV.

DOCKETING AND HEARING.

Causes in which the people are a party, and in which they have a direct interest in the decision, shall be placed at the head of the docket; all other cases shall be docketed and called for argument in the order in which the records shall have been filed with the Clerk.

XXVI.

CALL OF DOCKET—EXPIRATION OF RULES.

The civil docket shall be called numerically, and the causes shall be argued, continued, or otherwise disposed of, as they are called, unless, for good cause shown they be placed at the foot of the docket; but not more than five cases shall be called on any one day. All unexpired rules will terminate upon the call of the cause for hearing: *Provided*, That if the Court shall give time to either party without the consent of the other, the cause shall not lose its precedence on the docket.

Rules of Practice.

XXVII.

TIME OF FILING ABSTRACTS AND BRIEFS.

In all cases where the record shall have been filed with the Clerk not less than twenty days before the first day of the term, and including all causes continued from a former term, the plaintiff in error, or appellant, shall file with the Clerk his abstract and brief at least five days before the first day of the term; and in all other cases, down to and including number fifty of the term docket, the plaintiff in error, or appellant, shall file his abstract and brief on or before Monday of the second week of the term; and in all cases from number fifty-one to number seventy-five, inclusive, on or before Monday of the third week of the term; and in all cases from number seventy-six to one hundred, inclusive, on or before Monday of the fourth week of the term; and in all cases from number one hundred and one to and including one hundred and twenty-five, on or before Monday of the fifth week of the term; and in all cases subsequent to number one hundred and twenty-five, on or before Monday of the sixth week of the term. In case of the failure of the plaintiff in error, or appellant, to file either his abstract or brief within the time above prescribed, the judgment or decree of the court below will, on the call of the docket, be affirmed. In all cases, the appellee or defendant in error shall file his brief at least one day before the day the cause is called for hearing.

XXVIII.

ORAL ARGUMENT.

Oral arguments will be heard on the calling of a cause upon the regular call of the docket, on behalf of the appellant, or plaintiff in error, if he shall have complied with the rule in regard to filing printed abstract and brief; and on behalf of the appellee, or defendant in error, if he shall have filed his printed brief on or before the day preceding the day of the calling of the cause. Printed or written arguments on behalf of either party, in addition to the brief, will not be received unless the same shall have been filed within the time prescribed by these rules for the filing of printed briefs by such party, except that the appellant or plaintiff in error shall be at liberty to file a written or printed reply at any time before the argument of the case is commenced.

Rules of Practice.

XXIX.

TIME FOR ARGUMENT.

The time allowed for each oral argument upon the hearing of a cause, shall be restricted to one hour, except the closing argument, which shall be restricted to thirty minutes, unless otherwise specially permitted. Oral arguments will not be heard upon any motion, unless specially directed by the Court.

XXX.

DAMAGES ON DISMISSING APPEALS.

When appeals from decrees, judgments or orders for the recovery of money, are dismissed by this Court for want of prosecution, or for failing to file authenticated copies of records, as required by law, the Court will award damages against the appellant upon the amount recovered in the court below, not exceeding ten per cent. on the first \$100, and five per cent. on any excess.

XXXI.

RE-HEARINGS—TIME AND MANNER OF APPLICATION.

The manner of applying for a re-hearing shall be as follows : Within fifteen days after a decision is entered of record, party desiring a re-hearing shall give actual notice in writing to the opposite party, or to his attorney, of his intention to make such application, and, within thirty days after the filing of the opinion, shall place on file in the Clerk's office six printed copies of the petition.

XXXII.

Application for a re-hearing of any cause shall be made by petition to the Court, signed by counsel, briefly stating the grounds for a re-hearing, and the authorities relied on in support thereof. All cases in which a re-hearing has been granted, or in which a petition therefor is pending, shall be placed by the Clerk on the term docket in the order of their general number.

XXXIII.

RE-HEARING—SUPERSEDEAS—STAY OF PROCEEDINGS.

Any two of the Justices of this Court may, in vacation, issue an order which shall operate as a supersedeas in any case which has

Rules of Practice.

been submitted to this Court for hearing and judgment, whenever a re-argument of the same shall, in their opinion, be advisable.

XXXIV.

WHEN OPINION FILED IN VACATION.

Whenever a petition for a re-hearing shall be presented to either of the Justices of this Court in vacation, if he shall certify that there is probable grounds for granting a re-hearing, all further proceedings authorized by the judgment of this Court shall be stayed until the next term of the Court.

XXXV.

EXECUTIONS.

Upon the affirmance of judgments, executions may issue at the option of the party, from this Court, or if such party so elect, a writ of procedendo shall be issued to the court below, upon the payment, by the successful party, of the costs made by him in this Court.

XXXVI.

ABSTRACTS—TAXED AS COSTS.

Upon printed abstracts being furnished in conformity to the rules of this Court, it shall be the duty of the Clerk to tax a printers' fee, at the rate of twenty cents for each one hundred words of one copy of such abstract, against the unsuccessful party not furnishing such abstracts, as costs to be recovered by the successful party furnishing the same.

XXXVII.

Whereas, by a rule of the Supreme Court, it is ordered, that in all cases removed to that court from the Appellate courts, only so much of the record embracing a copy of the final judgment or decretal order of the circuit court, with a short statement of the facts found by the Appellate court and a copy of their final judgment, as shall be necessary to clearly and fully present the question upon which the decision of the Supreme Court shall be sought, shall be certified to that court, and that the same shall be directed by at least two of the judges of the Appellate court, and that their order to that effect shall be certified as a part of the record.

Rules of Practice.

Therefore, it is ordered by this Court, that the counsel for the party desiring to remove a cause from this Court to the Supreme Court, shall prepare and submit to the counsel for the opposite party a draft of an order of this Court, as required by said rule of the Supreme Court, which draft shall contain, first, a designation of the several parts of the record, including the final judgment or decree of the court below, and the final judgment of this Court necessary to present clearly and fully the questions upon which the decision of the Supreme Court shall be sought; and secondly, the facts found by this Court from the evidence in the record, so far as said facts are pertinent to said questions; and if the counsel cannot agree, they shall, after reasonable notice, each present to this Court, or one of the Judges thereof, their suggestions in relation thereto in writing, in order that the points in difference, if any, may be fairly settled, in compliance with said rule of the Supreme Court.

XXXVIII.

Friday of the first week of each term of this Court will be set apart for the examination of applicants for admission to the bar.

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RULES OF PRACTICE
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT.

ADOPTED AT THE DECEMBER TERM, 1877.

I.

WRITS OF ERROR—SUPERSEDEAS.

No supersedeas will be granted unless the transcript of the record on which the application is made be complete and so certified by the clerk of the court below, and the requisite bond be entered into and filed in the office of the Clerk of this Court according to law, with an assignment of errors written on or appended to the record. And, on every application for a supersedeas, an abstract of the record, with a brief containing the points and authorities relied upon, and pointing specifically to those portions of the record upon which the alleged errors arise, with the record, shall be presented to the Court or Judge to whom the application is made. Every such application, whether made in open court, or to a justice in vacation, must be accompanied by an affidavit of the proposed securities, or some other credible person, justifying the sufficiency of bail, sworn to and properly certified.

II.

Whenever a bond is executed by an attorney in fact, the Clerk shall require the original power of attorney to be filed in his office, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question ; in which case, the original power of attorney shall be presented to the Clerk and a true copy thereof filed, certified by the Clerk to be a true copy of the original.

Rules of Practice.

III.

When a writ of error shall be made a *supersedeas* the Clerk shall endorse upon said writ the following words: "This writ of error is made a *supersedeas* and is to be obeyed accordingly." And he shall thereupon file the writ of error, with the transcript of the record, in his office. Said transcript shall be taken and considered as a due return to said writ, and thereupon it shall be the duty of the Clerk to issue a certificate in substance as follows, to wit:

STATE OF ILLINOIS, ss.

OFFICE OF THE CLERK OF THE APPELLATE }
COURT OF THE SECOND DISTRICT. }

I do hereby certify that a writ of error has issued from this Court for the reversal of a judgment obtained by.....vs....., in the.....Court of
..at the.....term, A. D.in a certain action of.....which writ of error is made a *supersedeas*, and is to operate as a suspension of the execution of the judgment, and as such is to be obeyed by all concerned.

Given under my hand and the seal of said Appellate Court, at.....this
.....day of, A. D. 18...

....., Clerk.

IV.

Writs of error shall be directed to the Clerk or keeper of the record of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this Court; but where the plaintiff in error shall file in the office of the Clerk of this Court a transcript of the record, duly certified to be full and complete, it shall not be necessary to send such writ to the clerk of the inferior court, but such transcript shall be taken and considered a due return to said writ.

V.

The process on writs of error shall be a *scire facias* to hear errors, issued on the application of the plaintiff in error to the Clerk, directed to the sheriff, or other officer of the proper county, commanding him to summon the defendant in error to appear in Court, and show cause, if any he have, why the judgment or decree mentioned in the writ of error shall not be reversed. If the *scire facias* be not returned executed, an *alias* and *pluries* may issue without an order of Court.

Rules of Practice.

VI.

The first day of each term shall be return day, for the return of process. And no party shall be compelled to answer or prepare for hearing, unless the *scire facias* shall have been served ten days before the return day thereof; nor shall a defendant be at liberty to enter his appearance and compel the plaintiff to proceed with the cause, unless the defendant shall have given the plaintiff ten days' notice, before the term, of his intention to enter his appearance and have the cause proceed to a hearing.

VII.

Whenever a writ of error is made a supersedeas, the plaintiff in error shall, on filing the record with the Clerk, at the same time order and direct a *scire facias* to issue to hear errors, and shall use reasonable diligence to have the same served ten days before the first day of the term to which the writ of error is made returnable. On failing to do so, the defendant in error shall have the right to a hearing at the said term, after joining in error, without giving ten days' notice, as required by rule six: *Provided*, if there be not ten days between the allowance of the supersedeas and the sitting of the Court, the cause shall stand continued until the next term, unless by consent of parties it shall be otherwise ordered.

VIII.

NOTICE TO PURCHASERS AND TERRE-TENANTS.

Whenever guardians, executors or administrators, or others acting in a fiduciary character, shall have obtained an order or decree for the sale of lands in causes *ex parte*, and a sale has been had under such decree or order, and the same shall be brought to this Court for revision, the names of purchasers or *terre-tenants* of such lands, if known, shall be suggested to the Court by affidavit of the plaintiff in error, and notice shall be given them of the pendency of the writ of error ten days before the first day of the term of Court to which the writ of error is returnable.

IX.

RECORDS OF INFERIOR COURTS—HOW PREPARED.

Hereafter, clerks of courts in this State, in cases of appeal, and

Rules of Practice.

of error or *certiorari*, in making up "an authenticated copy of the record of the judgment appealed from," or in sending up a transcript of the record to this Court as a return to the writ of error or *certiorari*, shall certify to this Court, unless some portion thereof may not be necessary : First, a copy of the process, or notice and proof of publication and of mailing, or excuse for not mailing ; second, the pleadings of the parties respectively ; third, the verdict in jury trials ; fourth, the judgment of the court below, whether tried by the court or jury ; fifth, all orders in the same cause made by the court ; sixth, the bill of exceptions ; and, seventh, the appeal bond in cases of appeal. And in no case shall the said clerk insert in such transcript any affidavit, account or other document, or writing, or other matter, which, according to the decisions of the Supreme Court, have been held to constitute no part of the record of a cause. The transcript of the record in chancery causes shall contain, unless unnecessary to copy all, a copy of the process or of the notice and proof of publication and of mailing or excuse for not mailing, the pleadings, the decree, and other record entries, the evidence as contained in the certificate of evidence, the appeal bond, and such other matters only, if any, as may be necessary to properly present in this Court the matters in controversy.

X.

The clerk of the court below shall arrange the several parts of the record aforesaid according to their chronological order. The Clerk of this Court shall not tax as costs in this Court any matter inserted in such transcript contrary to the rule.

XI.

The party or his attorney may, by *præcipe*, indicate to the Clerk, and direct what of the files of the cause shall be copied into the record, and, in such case, if the record shall be insufficient, it shall be supplied at his cost, and, if unnecessarily voluminous, he shall pay the costs accrued on account of copying such unnecessary matter.

XII.

TIME FOR FILING RECORDS.

No case brought to this Court by appeal shall be placed on the Court docket for hearing, unless the record is filed within the time

Rules of Practice.

now prescribed by law, or within the further time allowed by the Court for filing the same, except, in extraordinary cases, the Court may, upon special application, order a case to be placed on the hearing docket.

XIII.

HEARING DOCKET.

No case which may be brought to this Court on writ of error shall be placed on the Court docket for hearing, unless the record shall be filed on or before the second day of the term, or within such further time as may be allowed by the Court for filing the same, except in extraordinary cases the Court, upon special application, may order a cause to be placed on the hearing docket.

XIV.

REMOVING RECORDS.

No person shall remove from the office of the clerk any record of this Court, except upon special leave granted for that purpose. No record shall be taken from the files of the Court, except on application therefor to the clerk or his deputy; and it is made the duty of the clerk to report promptly to the Court every violation of this rule. The clerk shall be held responsible for the safe keeping and production of the records. Applications for leave to remove records may be considered at any time, in the discretion of the Court.

XV.

ASSIGNMENT OF ERRORS.

The appellant or plaintiff in error shall, in all cases, assign errors at the time of filing his record in this Court, and, on failing to do so, the case may be dismissed; but other errors may be assigned after the filing of the record, by leave of the Court. The appellee or defendant in error shall have the right to assign cross errors within two days after the record is filed in this Court, and not afterward without special leave of the Court. The assignment of errors and cross errors must be written upon or attached to the record.

XVI.

AGREED CASES.

No judgment will be pronounced in any agreed case placed upon

Rules of Practice.

the records of this Court, unless, if required, an affidavit shall be filed, setting forth that the matters presented by the record were litigated in good faith, about a matter in actual controversy between the parties, and that the opinion of the Court is not sought with any other design than to adjudicate and settle the law relative to the matter in actual controversy between the parties to the record.

XVII.

MOTIONS.

Motions may be made immediately after the decisions of the Court are announced, but at no other time, unless in case of necessity, or in relation to a cause when called in course. Motions for orders of course will be entered by the clerk with orders of course made thereon, viz: for hearing, taking under advisement, and entering decision, in such manner that a perfect record may be kept of each step in the cause.

XVIII.

SPECIAL MOTIONS—OBJECTIONS.

All special motions shall be in writing and filed with the clerk, together with the reasons in support thereof, at least one day before they shall be submitted to the Court. Objections to motions must also be in writing. Oral arguments will not be heard.

XIX.

WHEN TO BE SUPPORTED BY AFFIDAVIT.

When a motion is intended, to be based on matters which do not appear by the record, the facts must be disclosed and supported by affidavit.

XX.

ABSTRACTS.

The party bringing a cause into this Court shall furnish a complete abstract or abridgment of the record, reducing the evidence to narrative form, instead of giving questions and answers, and referring to the appropriate pages of the record by numerals on the margin, and he shall cause such abstract to be printed in a neat and workmanlike manner, with small-pica type and leaded lines, on one side only, upon white foolscap paper, leaving a margin at least

Rules of Practice.

two inches in width on the left side of each sheet. Five copies of such printed abstract shall be filed in each case, one for each of the judges, one for the defendant in error or appellee, and one to be filed with the record.

XXI.

FURTHER ABSTRACTS.

The defendant's counsel shall be permitted, if he be not satisfied with the abstract or abridgment furnished by the plaintiff's counsel, to furnish each of the justices of this Court with such further abstracts as he shall deem necessary to a full understanding of the merits of the cause.

XXII.

BRIEFS.

Printed briefs will be required in all cases, whether argued orally in full, or in part only, or when submitted on briefs without oral argument. The briefs required shall contain a short, clear statement of the points, and the authorities in support thereof: and in citing cases from published reports, counsel will be required not only to give the book and page, but also the names of the parties as they appear in the title of the reported case; and the names of counsel filing briefs or abstracts must appear to the same. But the filing of a printed brief shall not preclude the party from filing full printed arguments in support of his brief of points and authorities, if he do so within the time his printed brief is required to be filed. Briefs and arguments must not contain personal reflections upon the court below, uncivil and unkind remarks or epithets in relation to the opposing counsel, nor unnecessary and irrelevant villification of the opposite party and witnesses.

XXIII.

NUMBER OF COPIES.

Five copies of the briefs must be filed in each case, one for each of the judges, one for the opposite party, and one to be filed with the record.

XXIV

COPIES TO BE DELIVERED.

In addition to the number of copies of abstracts, briefs and

Rules of Practice.

arguments required or permitted to be filed, the respective parties shall cause to be delivered to the opposite party, or his attorney, through the mail, or otherwise, a copy of the printed abstract, brief and argument, or brief and argument, as the case may be, on or before the day it is required to file the same in this Court; unless the residence or address of such opposite party, or his attorney, cannot, upon reasonable inquiry, be ascertained.

XXV.

CALL OF DOCKET—EXPIRATION OF RULES.

The docket shall be called numerically, and the causes shall be argued, continued, or otherwise disposed of, as they are called, unless, for good cause shown, they be placed at the foot of the docket; all unexpired rules will terminate upon the call of the cause for hearing. If, however, the Court shall give time to either party without the consent of the other, the cause shall not lose its precedence on the docket.

XXVI.

CALL OF DOCKET—FILING ABSTRACTS AND BRIEFS.

Hereafter the call of the docket will commence with the third day of the term, and fifteen cases per day will be subject to call. The appellant, or plaintiff in error, shall file his abstracts and briefs on or before the day fixed by law or by rule of this Court for filing the transcript of the record of the court below, unless, for cause shown, the time shall be extended. In the event that either the abstracts or briefs be not filed within the prescribed time, the judgment or decree of the Court below will, on the call of the docket, be affirmed. The defendant in error, or appellee, if he do not argue orally, can file a brief within ten days after the time fixed for filing the brief of plaintiff in error, or appellant, and the latter can have five days for a reply. At the expiration of this time the cause will stand for decision, and no further arguments will be received.

XXVII.

EFFECT OF FAILURE TO FILE BRIEFS IN TIME.

If the defendant in error, or appellee, fail to file his briefs within the prescribed ten days, the judgment or decree will be rev-
-er-

Rules of Practice.

pro forma, unless the court, on examination of the record, shall deem it proper to decide the case upon its merits.

XXVIII.

ORAL ARGUMENT.

Oral arguments will be heard on the calling of a cause upon the regular call of the docket, on behalf of the appellant or plaintiff in error, if he shall have complied with the rule in regard to filing printed abstracts and briefs; and on behalf of the appellee or defendant in error if he shall have filed his printed brief on or before the day preceding the calling of the cause. Where a cause shall be argued orally on behalf of either party, a printed argument in addition to his brief will not be received from such party unless the same shall have been filed within the time prescribed in this rule for the filing of his printed brief.

XXIX.

NO ORAL ARGUMENT ON MOTIONS.

Oral arguments will not be heard upon any motion, nor upon the rehearing of a cause, unless specially directed by the Court.

XXX.

TIME FOR ARGUMENT.

The time allowed for each oral argument shall be restricted to one hour, unless otherwise specially permitted.

XXXI.

DAMAGES ON DISMISSING APPEALS.

When appeals from decrees, judgments, or orders for the recovery of money are dismissed by this Court for want of prosecution or for failing to file authenticated copies of records, as required by law, the Court will award damages against the appellant, at ten per cent. upon the amount recovered in the Court below, if it be one hundred dollars, or less, and upon the amount of such recovery, if it exceed that sum, ten per cent. upon one hundred dollars thereof, and five per cent. on the remainder.

XXXII.

REHEARINGS—TIME AND MANNER OF APPLICATION.

Applications for rehearing will be entertained in that class of

Rules of Practice.

cases only in which the decision of this court cannot be reviewed by the Supreme Court. The manner of applying for a rehearing shall be as follows: Within fifteen days after a decision shall have been entered of record, the party desiring a rehearing shall give notice in writing to the opposite party, or to his attorney, of his intention to make such application, and within thirty days after the entry of such decision, shall place on file in the clerk's office five printed copies of the petition, and deliver one through the mail or otherwise to the opposite party, or attorney, if the address of such party or his attorney can, upon reasonable enquiry, be ascertained.

XXXIII.

PETITION FOR REHEARING—NOTICE THEREOF.

Applications for rehearing shall be made by petition to the Court, signed by counsel, briefly stating the reasons therefor, and the authorities relied on in support thereof. If the application be allowed, notice of the time when such rehearing will be had shall be given to the opposite party.

XXXIV.

REHEARINGS—SUPERSEDEAS—STAY OF PROCEEDINGS.

Any two of the justices of this Court may, in vacation, issue an order which shall operate as a *supersedeas* in any case which has been submitted to this Court for hearing and judgment, whenever a re-argument of the same shall, in their opinion, be advisable.

XXXV.

WHEN OPINION FILED IN VACATION.

Where a decision shall have been entered of record in vacation, and a petition for a rehearing shall be presented to either of the justices of this Court, if he shall certify that there is probable grounds for granting a rehearing, all further proceedings authorized by the judgment of this Court shall be stayed until the next term of the Court.

XXXVI.

REHEARING DOCKET.

The Clerk of this Court shall, at each term, docket all petitions for rehearing, separate and apart from the trial docket.

Rules of Practice.

XXXVII.

ABSTRACTS—TAXED AS COSTS.

Upon printed abstracts being furnished in conformity to the rules of this Court, it shall be the duty of the clerk to tax a printer's fee, at the rate of twenty cents for each one hundred words of one copy of such abstract, against the unsuccessful party not furnishing such abstracts, as costs, to be recovered by the successful party furnishing the same.

XXXVIII.

PLEAS—TIME FOR FILING.

When the defendant in error, or appellee, desires to plead, instead of joining in error, he shall file his plea or pleas in the office of the clerk, within one day after the time at which the transcript of the record of the Court below is required to be filed, unless for cause shown, the time for filing such plea or pleas be extended.

XXXIX.

APPEALS TO SUPREME COURT—ORDER AND RECORD.

Whereas, by a rule of the Supreme Court, adopted Jan. 18, 1878, it is ordered that in all cases removed to that Court from this Court, only so much of the record, embracing a copy of the final judgment or decretal order of the Circuit court, with a short statement of the facts found, by the Appellate court, and a copy of their final judgment as shall be necessary to clearly and fully present the question upon which the decision of the Supreme Court shall be sought, shall be made up, and that the same shall be directed by at least two of the judges of the Appellate court, and that their order to that effect shall be certified as a part of the record;

It is hereby required by this Court that the counsel of appellant or plaintiff in error, shall prepare and submit to the counsel for appellee or defendant in error, a draft of the order of this Court, containing the statement of facts, and portions of the record only necessary to present clearly and fully the questions aforesaid, and if the counsel cannot agree, they shall, after reasonable notice, each present to this Court, or one of the judges thereof, their suggestions, in writing, in relation thereto, in order that the points in difference, if any, may be fairly settled and adjusted, in compliance with said order of the Supreme Court.

Rules of Practice.

ADOPTED JUNE 18, 1878.

XL.

EXAMINATION OF STUDENTS.

Ordered, That hereafter the examination of applicants for admission to the bar will take place on the second day of the term.

RULES OF PRACTICE
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT.

ADOPTED AT THE NOVEMBER TERM, 1877.

I.

WRITS OF ERROR—SUPERSEDEAS.

No supersedeas will be granted unless a transcript of the record on which the application is made be complete, and so certified by the clerk of the court below, and the requisite bond be entered into and filed in the office of the Clerk of this Court, according to law, with an assignment of errors written on or appended to the record. and on every application for a supersedeas, an abstract of the record, with a brief, containing the points and authorities relied upon, and pointing specifically to those portions of the record upon which the alleged errors arise, with the record, shall be presented to the Court or Judge to whom the application is made. Every such application, whether made in open Court, or to a Justice in vacation, must be accompanied by an affidavit of the proposed securities, or some other credible person, justifying the sufficiency of bail, sworn to and properly certified.

II.

BOND.

Whenever a bond is executed by an attorney in fact, the clerk shall require the original power of attorney to be filed in his office, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question ; in which case the original power of attorney shall be presented to the

Rules of Practice.

clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

III.

FORM OF WRIT WHEN A SUPERSEDEAS.

When a writ of error shall be made a supersedeas, the clerk shall endorse upon said writ the following words: "This writ of error is made a supersedeas, and is to be obeyed accordingly," and he shall thereupon file the writ of error with the transcript of the record, in his office. Said transcript shall be taken and considered as a due return to said writ, and thereupon it shall be the duty of the clerk to issue a certificate, in substance as follows, to wit:

STATE OF ILLINOIS—ss.

OFFICE OF THE CLERK OF THE APPELLATE COURT FOR }
THE THIRD DISTRICT OF THE STATE OF ILLINOIS. }

I do hereby certify that a writ of error has issued from this Court for the reversal of a judgment obtained by.....vs..... in the.....Court of.....at the.....term, A. D. 18...., in a certain action of....., which writ of error is made a supersedeas, and is to operate as a suspension of the execution of the judgment, and as such, is to be obeyed by all concerned.

Given under my hand and the Seal of the said Appellate Court, at Springfield, this.....day of....., A. D. 18....

.....Clerk.

IV.

TO WHOM DIRECTED.

Writs of error shall be directed to the clerk or keeper of the record to the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record of this Court; but where the plaintiff in error shall file in the office of the clerk of this Court a transcript of the record duly certified to be full and complete, before a writ of error issues, it shall not be necessary to send such writ to the clerk of the inferior court, but such transcript shall be taken and considered as a due return to said writ.

V.

PROCESS—WRITS OF ERROR.

The process on writs of error shall be a *scire facias* to hear errors,

Rules of Practice.

issued on the application of the plaintiff in error to the Clerk, directed to the sheriff or other officer of the proper county, commanding him to summon the defendant in error to appear in Court, and show cause, if any he have, why the judgment or decree mentioned in the writ of error shall not be revised. If the *scire facias* be not returned executed, an *alias* and *pluries* may issue without an order of Court.

VI.

RETURN DAY.

The first day of each term shall be return day for the return of process, and no party shall be compelled to answer or prepare for hearing unless the *scire facias* shall have been served ten days before the return day thereof; nor shall a defendant be at liberty to enter his appearance and compel the plaintiff to proceed with the cause, unless the defendant shall have given the plaintiff ten days' notice, before the term, of his intention to enter his appearance, and have the cause proceed to a hearing.

VII.

In all cases, in which a writ of error is made a supersedeas, the plaintiff in error shall, on filing the record with the Clerk, at the same time order and direct a *scire facias* to issue to hear errors, and shall use reasonable diligence to have the same served ten days before the first day of the term to which the writ of error is made returnable; on failing to do so, the defendant in error shall have the right to a hearing at the said term, after joining in error, without giving ten days notice as required by Rule VI: *Provided*, if there be not ten days, between the allowance of the supersedeas and the sitting of the Court, the cause shall stand continued until the next term, unless by consent of the parties it shall be otherwise ordered.

VIII.

NOTICE TO PURCHASERS AND TERRE-TENANTS.

In all cases wherein guardians, executors or administrators, or others acting in a fiduciary character have obtained an order, or decree for the sale of lands in causes *ex parte*, and a sale has been had under such decree or order, and the same shall be brought to

Rules of Practice.

this Court for revision, the purchaser or *terre-tenants* of such lands, if known, shall be suggested to the Court by affidavit of the plaintiff in error, and notice given them of the pendency of the writ of error ten days before the first day of the term of Court to which the writ of error is returnable, so that said *terre-tenants* may appear and defend.

IX.

RECORDS OF INFERIOR COURTS—HOW PREPARED.

Hereafter, the clerks of the inferior courts in this State, in cases of appeal and of error, or *certiorari* in making up “an authenticated copy of the records of the judgment appealed from,” or in sending up a transcript of the record to this Court as a return to a writ of error, or *certiorari*, shall certify to this Court: *First*—A copy of the process; *Second*—The pleadings of the parties, respectively; *Third*—The verdict in jury trials; *Fourth*—The judgment of the court below, whether tried by the court or jury; *Fifth*—All orders in the same cause made by the court; *Sixth*—The bill of exceptions; and, *Seventh*—The appeal bond in cases of appeal. And in no case shall the said clerk insert in such transcript any affidavit, account, or other document or writing, or other matter, which, according to the decisions of the Supreme Court, have been held to constitute no part of the record of a cause. This rule shall not extend to appeals or writs of error in chancery or criminal causes.

X.

The clerk of the court below shall arrange the several parts of the record aforesaid according to their chronological order. The Clerk of this Court shall not tax as costs in this Court any matter inserted in such transcript contrary to the rule.

XI

The party or his attorney may, by *præcipe*, indicate to the Clerk, and direct what of the files of the cause shall be copied into the record; and, in such case, if the record shall be insufficient, it shall be supplied at his costs, and, if unnecessarily voluminous, he shall pay the costs accrued on account of the copying of such unnecessary matters.

Rules of Practice.

XII.

TIME FOR FILING RECORDS.—HEARING DOCKET.

No case brought to this Court by appeal shall be placed on the Court docket for hearing, unless the record is filed within the time now prescribed by law, or within the further time allowed by the Court for filing the record, except in extraordinary cases, the Court upon special application, may order a cause to be placed on the hearing docket.

XIII.

No case may be brought to this Court on writ of error, shall be placed on the Court docket for hearing, unless the record shall be filed on or before the second day of the term, or within such further time as may be allowed by the Court for filing the same, except in extraordinary cases, the Court, upon special application, may order a cause to be placed upon the hearing docket.

XIV.

REMOVING RECORDS.

No person shall remove from the office of the Clerk any record of this Court, except upon special leave granted for that purpose. No record shall be taken from the files of the Court, except on application therefor to the Clerk or his deputy; and it is made the duty of the Clerk to report promptly to the Court every violation of this rule. The Clerk shall be held responsible for the safe keeping and production of the records. Application for leave to remove records may be considered at any time in the discretion of the Court.

XV.

ASSIGNMENT OF ERRORS.

The appellant or plaintiff in error shall, in all cases, assign errors at the time of filing his record in this Court, and, on failing to do so, the case may be dismissed; but other errors may be assigned after the filing of the record, by leave of the Court. The appellee or defendant in error, shall have the right to assign cross errors within two days after the Record is filed in this Court, and not afterwards without special leave of the Court. The assignment of

Rules of Practice.

errors and cross errors must be written upon or attached to the record.

XVI.

AGREED CASES.

No judgment will be pronounced in any agreed case placed upon the records of this Court, unless an affidavit shall be filed, setting forth that the matters presented by the record were litigated in good faith about a matter in actual controversy between the parties, and that the opinion of this Court is not sought with any other design than to adjudicate and settle the law relative to the matter in actual controversy between the parties to the record.

XVII.

MOTIONS.

Motions may be made immediately after the decisions of the Court are announced, but at no other time, unless in case of necessity, or in relation to a cause when called in course.

XVIII.

Motions are to be made by the attorneys in the following order: *First*—By the Attorney General; *Next*—By the oldest practitioner at the bar, and so on to the youngest.

XIX.

All special motions shall be in writing and filed with the Clerk, together with the reasons in support thereof, at least one day before they shall be submitted to the Court. Objections to motions must also be in writing; oral arguments will not be heard.

XX.

When a motion is intended to be based on matters which do not appear by the record, the facts must be disclosed and supported by affidavit.

SECURITY FOR COSTS.

XXI.

Upon filing an affidavit that any plaintiff in error is not a resident of this State, and that no bond for costs has been filed, a rule

Rules of Practice.

shall be entered against him, of which he shall take notice, to show cause why the writ shall not be dismissed.

XXII.

ABSTRACTS.

In all cases, the party bringing a cause into this Court shall furnish a complete abstract or abridgment of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstract to be printed, in a neat and workman like manner, with small pica type and leaded lines, on one side only, upon white foolscap paper, leaving a margin of at least two inches in width on the left hand side of each sheet. *Five* copies of such printed abstract shall be filed in each case—one for each of the judges, one for the defendant in error or appellee, and one to be filed with the record.

XXIII.

The defendant's counsel shall be permitted, if he is not satisfied with the abstracts or abridgment furnished by the plaintiff's counsel, to furnish each of the Justices of this Court with such further abstracts as he shall deem necessary to a full understanding of the merits of the case.

XXIV.

BRIEFS.

Printed briefs will be required in all cases, whether argued orally, in full or in part only, or when submitted on briefs without oral argument. The briefs required should contain a short, clear statement of the points, and the authorities in support thereof; and in citing cases from published reports, Counsel will be required not only to give the book and page, but also the names of the parties as they appear in the title or the reported case; and the names of counsel filing brief or abstract must appear to the same. But the filing of a printed brief shall not preclude the party from filing full printed or written arguments in support of his brief of points and authorities, provided he does so within the time his printed brief is required to be filed.

XXV.

Five copies of the briefs must be filed in each case, one for each

Rules of Practice.

of the Judges, one for the opposite party, and one to be filed with the Record.

XXVI.

DOCKETING AND HEARING.

Causes in which the People are a party, and in which they have a direct interest in the decision, shall be placed at the head of the Docket; all other cases shall be docketed and called for argument in the order in which the Records shall have been filed with the Clerk.

XXVII.

CALL OF DOCKET—EXPIRATION OF RULES.

The civil docket shall be called numerically, and the causes shall be argued, continued, or otherwise disposed of, as they are called, unless, for good cause shown, they be placed at the foot of the docket; all unexpired rules will terminate upon the call of the cause for hearing: *Provided*, That if the Court shall give time to either party without the consent of the other, the cause shall not lose its precedence on the docket.

XXVIII.

CALL OF THE DOCKET.

In all cases when the record shall have been filed with the Clerk not less than ten days before the first day of the term, and in all cases continued from a former term, the plaintiff in error or appellant shall file with the Clerk his abstracts and briefs at least five days before the first day of the term; and the defendant in error or appellee shall file his briefs one day before the case is subject to call for trial. All such cases shall be subject to call at the rate of twenty cases per day, on and after the first day of the term. This rule shall not be in force at the present term.

XXIX.

In all other cases not included in the above rule, the plaintiff in error or appellant must file his abstracts and briefs in the office of the Clerk six days before the day when the case stands subject to call, and in all cases, in the event that either the brief or abstract is not filed within the prescribed time, the judgment or decree of the

Rules of Practice.

court below will, on the call of the docket, be affirmed. The defendant in error or appellee must file his brief in the clerk's office one day before the case is subject to call for hearing; and no case under this rule shall be called before the second Tuesday of the term. All cases shall be called at the rate of twenty cases per day.

XXX.

BRIEFS AND ABSTRACTS.

If the defendant in error or appellee shall fail to file his brief in compliance with these rules, the judgment or decree will be reversed *pro forma*, unless the Court on examination of the Record shall deem it proper to decide the case on its merits.

XXXI.

On the calling of a case for hearing, it may be argued orally, if the rules for filing abstracts and briefs have been complied with, or the case may be submitted on such abstracts and briefs, and the cause, in either case, shall then be taken for final determination, but in case the appellant or plaintiff in error does not argue the cause orally, he shall be allowed three days, after the call, to file a brief in reply.

XXXII.

Oral argument will not be heard upon any motion; nor upon the rehearing of a cause, unless specially directed by the Court.

XXXIII

The time allowed for each oral argument shall be restricted to one hour, unless otherwise specially permitted.

XXXIV.

DAMAGES ON DISMISSING APPEALS.

When appeals from decrees, judgments or orders for the recovery of money, are dismissed by this Court for want of prosecution, or for failing to file authenticated copies of records, as required by law, the Court will award damages against the appellant, at ten per cent upon the amount recovered in the court below, if it be less than one hundred dollars, and at five per cent. upon the amount of such recovery, if it equals or exceeds that sum.

Rules of Practice.

XXXV.

RE-HEARING.

Application for a re-hearing of any cause shall be made by petition to the Court, signed by counsel, briefly stating the grounds for a re-hearing, and the authorities relied on in support thereof. When a re-hearing is granted, notice shall be given to the opposite party of the time when such re-hearing will be had.

XXXVI.

The manner of applying for a re-hearing shall be as follows: Within fifteen days after a decision is announced, a party applying for a re-hearing shall give actual notice in writing to the opposite party, or to his attorney, of his intention to make such application, and within thirty days after the decision is announced, shall place on file in the Clerk's office five printed copies of his petition.

XXXVII.

Any two of the Justices of this Court may, in vacation, issue an order which shall operate as a supersedeas in any case which has been submitted to this Court for hearing and judgment, whenever a re-argument of the same shall, in their opinion, be advisable.

XXXVIII.

When a decision in any case is rendered in vacation, and a petition for re-hearing shall be presented to either of the Justices of this Court, if he shall certify that there are probable grounds for granting a re-hearing, all further proceedings, authorized by the judgment of this Court, shall be stayed until the next term thereof.

ADDITIONAL RULES ADOPTED.

XXXIX.

In all cases where an application is made in vacation for an appeal from this court to the Supreme Court, the party making such application shall present, to one of the Judges of this Court, a brief statement in writing, giving the title of the cause, the nature and amount of the judgment, order or decree from which the appeal is desired, the date of the rendition of such judgment, order or decree, and the name of the security proposed, accompanied with an affidavit showing the solvency and sufficiency of the security so proposed.

XL.

All parties praying an appeal, or prosecuting a writ of error to the Supreme Court, shall present to the Court or Judge allowing such appeal, or in case of a writ of error, to one of the Judges, a brief statement in writing, stating the points or questions he

Rules of Practice.

desires to present to the Supreme Court for review, together with a statement of the parts of the record he desires sent up.

XLI.

Ordered: That the Clerk of this Court be and is hereby allowed for his fee, for making out and certifying under seal to the Supreme Court, for each certificate of qualification of any law student for admission to the Bar, the sum of two dollars.

XLII.

Ordered: Every applicant for certificate for qualification for admission to the Bar by the Supreme Court of this State, will be required to appear before this Court at one of its regular terms, and then and there, in open Court, be examined by the Court touching his or her qualifications as an attorney and counselor at law; and shall also then and there present to the Court a certificate from some court of record in this State, of good moral character. Provided, however, it shall be a requisite of admission to such examination, that such applicant shall have pursued a regular course of law studies in the office of some lawyer in general practice, for at least two years, of which fact he or she shall satisfy the Court by certificate of such lawyer, and his or her own affidavit. Provided, further, that the time employed at any law school as a student, shall be considered as a part of the two years, of which the Court shall be satisfied in the manner above specified.

Tuesday of the third week of each term shall be the day on which such examination shall be had.

XLIII.

Ordered: That each applicant for examination to be admitted to the Bar, be permitted after the examination is over, to withdraw his certificate of good moral character, and affidavit showing that he is over twenty-one years of age, and a citizen of the State, for the purpose of presenting the same to the Supreme Court, with his certificate of examination.

XLIV.

Ordered: Upon printed abstracts being furnished in this Appellate Court district, in conformity to the rules of this Court, it shall be the duty of the Clerk to tax a printer's fee, at the rate of twenty cents for each one hundred words of one copy of such abstracts, against the unsuccessful party not furnishing such abstracts, as costs, to be recovered by the successful party furnishing the same.

RULES OF PRACTICE
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT.

ADOPTED AT THE FEBRUARY TERM, 1878.

I.

WRITS OF ERROR—SUPERSEDEAS.

No supersedeas will be granted unless a transcript of the record on which the application is made be complete, and so certified by the clerk of the court below, and the requisite bond be entered into and filed in the office of the clerk of this court according to law, with an assignment of errors written on or appended to the record. And on every application for a supersedeas, an abstract of the record, with a brief containing the points and authorities relied upon, and pointing specifically to those portions of the record upon which the alleged errors arise, with the record, shall be presented to the court or judge to whom the application is made. Every such application whether made in open court or to a justice in vacation, must be accompanied by an affidavit of the proposed securities, or some other credible person, justifying the sufficiency of bail, sworn to and properly certified.

II.

BOND.

Whenever a bond is executed by an attorney in fact, the clerk shall require the original power of attorney to be filed in his office, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question ; in which case the original power of attorney shall be presented to the

Rules of Practice.

clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

III.

FORM OF WRIT WHEN A SUPERSEDEAS.

When a writ of error shall be made a supersedeas, the clerk shall endorse upon said writ the following words: "This writ of error is made a supersedeas, and is to be obeyed accordingly," and he shall thereupon file the writ of error, with the transcript of the record, in his office. Said transcript shall be taken and considered as a due return to said writ, and thereupon it shall be the duty of the clerk to issue a certificate, in substance as follows, to-wit:

STATE OF ILLINOIS, ss.

OFFICE OF THE CLERK OF THE APPELLATE }
COURT OF THE FOURTH DISTRICT. }

I do hereby certify that a writ of error has issued from this Court for the reversal of a judgment obtained byv.in thecourt ofat theterm, A. D. 18...., in the certain action of, which writ of error is made a supersedeas, and is to operate as a suspension of the execution of the judgment, and, as such, is to be obeyed by all concerned.

Given under my hand and the seal of the Appellate Court of the Fourth District at, this day of, A. D. 18....

..... Clerk.

IV.

TO WHOM DIRECTED.

Writs of error shall be directed to the clerk or keeper of the record of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this Court; but where the plaintiff in error shall file in the office of the clerk of this Court a transcript of the record duly certified to be full and complete, before a writ of error issues, it shall not be necessary to send such writ to the clerk of the inferior court, but such transcript shall be taken and considered as a due return to said writ.

V.

PROCESS—WRITS OF ERROR.

The process on writs of error shall be a *scire facias* to hear errors, issued on the application of the plaintiff in error to the clerk, direct-

Rules of Practice.

ed to the sheriff or other officer of the proper county, commanding him to summon the defendant in error to appear in court, and show cause, if any he have, why the judgment or decree mentioned in the writ of error shall not be reversed. If the *scire facias* be not returned executed, an *alias* and *pluries* may issue without an order of Court.

VI.

RETURN DAY.

The first day of each term shall be return day, for the return of process. And no party shall be compelled to answer or prepare for hearing, unless the *scire facias* shall have been served ten days before the return day thereof; nor shall a defendant be at liberty to enter his appearance, and compel the plaintiff to proceed with the cause, unless the defendant shall have given the plaintiff ten days notice, before the term, of his intention to enter his appearance, and have the cause proceed to a hearing.

VII.

SCIRE FACIAS TO HEAR ERROR—NOTICE CONTINUED.

In all cases in which a writ of error is made a supersedeas, the plaintiff in error shall, on filing the record with the clerk, at the same time order and direct a *scire facias* to issue to hear errors, and shall use reasonable diligence to have the same served ten days before the first day of the term to which the writ of error is made returnable; on failing to do so, the defendant in error shall have the right to a hearing at the said term, after joining in error, without giving ten days notice as required by Rule VI: *Provided*, If there be not ten days between the allowance of the supersedeas and the sitting of the Court, the cause shall stand continued until the next term, unless by consent of parties it shall be otherwise ordered.

VIII.

NOTICE TO PURCHASERS AND TERRE-TENANTS

In all cases wherein guardians, executors or administrators, or others acting in a fiduciary character, having obtained an order or decree for the sale of lands in causes *ex parte* and a sale has been had under such decree or order, and the same shall be brought to this court for revision, the purchaser or *terre-tenants* of such lands,

Rules of Practice.

if known, shall be suggested to the Court by affidavit of the plaintiff in error, and notice given them of the pendency of the writ of error ten days before the first day of the term of the court to which the writ of error is returnable, so that said *terre-tenants* may appear and defend.

IX.

RECORDS OF INFERIOR COURTS—HOW PREPARED.

Hereafter, the clerks of the inferior courts in this State, in cases of appeal and of error or *certiorari*, in making up “an authenticated copy of the record of the judgment appealed from,” or in sending up a transcript of the record to this Court as a return to a writ of error or *certiorari*, shall certify to this Court : First, a copy of the process ; Second, the pleadings of the parties, respectively ; Third, the verdict in jury trials ; Fourth, the judgment of the court below whether tried by the court or jury ; Fifth, all orders in the same cause made by the court ; Sixth, the bill of exceptions ; and Seventh the appeal bond in cases of appeal. And in no case shall the said clerk insert in such transcript any affidavit, account, or other document or writing, or other matter, which, according to the decisions of the Supreme Court, have been held to constitute no part of the record of a cause. This rule shall not extend to appeals or writs of error in chancery causes.

X.

CLERK TO ARRANGE RECORD—COSTS.

The clerk of the Court below shall arrange the several parts of the record aforesaid according to their chronological order. The clerk of this Court shall not tax as costs in this Court any matter inserted in such transcript contrary to the rule.

XI.

WHAT TO BE COPIED IN THE RECORD.

The party or his attorney may, by *præcipe*, indicate to the clerk, and direct what of the files of the cause shall be copied into the record; and in such case, if the record shall be insufficient, it shall be supplied at his costs, and, if unnecessarily voluminous, he shall pay the costs accrued on account of the copying of such unnecessary matters.

Rules of Practice.

XII.

TIME FOR FILING RECORDS—HEARING DOCKET.

No case brought to this Court by appeal shall be placed on the Court docket for hearing, unless the record is filed within the time now prescribed by law, or within the further time allowed by the Court for the filing of the record, except in extraordinary cases, the Court, upon special application, may order a cause to be placed on the hearing docket.

XIII.

No case which may be brought to this Court on writ of error shall be placed on the Court docket for hearing, unless the record shall be filed on or before the second day of the term, or within such further time as may be allowed by the Court for filing the same, except in extraordinary cases, the Court, upon special application, may order a cause to be placed upon the hearing docket.

XIV.

No person shall remove from the office of the clerk, any record of this Court, except on special leave granted for that purpose. No record shall be taken from the files of the Court, except on application therefor to the clerk or his deputy; and it is made the duty of the clerk to report promptly to the Court every violation of this rule. The clerk shall be held responsible for the safe keeping and production of the records. Application for leave to remove records may be considered at any time in the discretion of the Court.

XV.

ASSIGNMENT OF ERRORS.

The appellant or plaintiff in error shall, in all cases, assign errors at the time of filing his record in this Court, and, on failing to do so, the case may be dismissed; but other errors may be assigned after the filing of the record, by leave of the Court. The appellee or defendant in error shall have the right to assign cross-errors within two days after the record is filed in this Court, and not afterwards without special leave of the Court. The assignment of errors and cross-errors must be written upon or attached to the record.

Rules of Practice.

XVI.

AGREED CASES.

No judgment will be pronounced in any agreed case placed upon the records of this Court, unless an affidavit shall be filed, setting forth that the matters presented by the record were litigated in good faith about a matter in actual controversy between the parties, and that the opinion of this Court is not sought with any other design than to adjudicate and settle the law relative to the matter in actual controversy between the parties to the record.

XVII.

MOTIONS.

Motions may be made immediately after the decisions of the Court are announced, but at no other time, unless in case of necessity, or in relation to a cause when called in course.

XVIII.

All special motions shall be in writing and filed with the clerk, together with the reasons in support thereof, at least one day before they shall be submitted to the Court. Objections to motions must also be in writing; oral arguments will not be heard.

XIX.

When a motion is intended to be based on matters which do not appear by the record, the facts must be disclosed and supported by affidavit.

XX.

Motions to vacate orders, affirming or reversing judgments *pro forma* and of continuance, and taking causes on call of the docket, will not be considered by the Court, unless reasonable notice, in writing, shall have been given to the opposite party or his attorney, of an intention to present such motions.

XXI.

SECURITY FOR COSTS.

Upon filing an affidavit that any plaintiff in error is not a resident of this State, and that no bond for costs has been filed, a rule shall

Rules of Practice.

be entered against him, of which he shall take notice, to show cause why the writ shall not be dismissed.

XXII.

ABSTRACTS.

In all cases the party bringing a cause into this Court shall furnish a complete abstract or abridgment of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstract to be printed, in a neat and workman-like manner, with small pica type and leaded lines, on one side only, upon white foolscap paper, leaving a margin at least two inches in width on the left hand side of each sheet. Five copies of such printed abstract shall be filed in each case, one for each of the judges, one for the defendant in error or appellee, and one to be filed with the record.

XXIII.

The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment furnished by the plaintiff's counsel, to furnish each of the justices of this Court with such further abstracts as he shall deem necessary to a full understanding of the merits of the cause.

XXIV.

BRIEFS.

Printed briefs will be required in all cases, whether argued orally, in full or in part only, or when submitted on briefs without oral argument. The briefs required should contain a short, clear statement of the points, and the authorities in support thereof; and in citing cases from published reports, counsel will be required not only to give the book and page, but also the names of the parties as they appear in the title of the reported case; and the names of counsel filing brief or abstract must appear to the same. But the filing of a printed brief shall not preclude the party from filing full printed or written arguments in support of his brief of points and authorities, provided he does so within the time his printed brief is required to be filed.

XXV.

Five copies of the briefs must be filed in each case, one for each

Rules of Practice.

of the judges, one for the opposite party, and one to be filed with the record.

XXVI.

CALL OF DOCKET—EXPIRATION OF RULES.

The docket shall be called numerically, and the causes shall be argued, continued, or otherwise disposed of, as they are called, unless, for good cause shown, they be placed at the foot of the docket; all unexpired rules will terminate upon the call of the cause for hearing: *Provided*, That if the Court shall give time to either party without the consent of the other, the cause shall not lose its precedence on the docket.

XXVII.

Hereafter the call of the docket will commence on the third day of the term, and fifteen cases per day will be subject to call. The abstract and brief of plaintiff in error or appellant must be filed in the clerk's office one day before the day when a cause stands subject to call, and in the event that either the abstract or brief is not filed within the prescribed time, the judgment or decree of the court below will, on the call of the docket, be affirmed. The defendant in error or appellee can file a brief within ten days after the time fixed for filing the brief of plaintiff in error or appellant, and the latter can have five days from the date of filing brief of appellee or defendant in error, for a reply, at the expiration of which time the cause will stand for decision.

XXVIII.

EFFECT OF FAILURE TO FILE BRIEFS IN TIME.

If the defendant in error or appellee fails to file his brief within the prescribed ten days, the judgment or decree will be reversed *pro forma*, unless the Court, on examination of the record, shall deem it proper to decide the case upon its merits.

XXIX.

When any cause wherein the appellant or plaintiff in error shall have complied with the rule in regard to filing printed abstracts and briefs, shall be called on the regular call of the docket, if either party shall desire to argue the case orally, then such cause shall be set

Rules of Practice.

down for oral argument on the day succeeding the time fixed by rule for brief of appellee or defendant in error to be filed, unless appellee or defendant in error shall waive his right to argue the case orally, in which event the appellant or plaintiff in error may submit an oral argument on call: *Provided*, No oral argument will be heard from the appellee or defendant in error unless he shall have complied with the rule in regard to filing his brief: *Provided*, also, oral arguments may be heard on call, if both parties shall so agree, and if both parties shall have filed the abstract and briefs required.

XXX.

The time allowed for each oral argument shall be restricted to one hour, unless otherwise specially permitted.

XXXI.

Oral argument will not be heard upon any motion, nor upon the rehearing of a cause, unless specially directed by the Court.

XXXII.

DAMAGES ON DISMISSING APPEALS.

When appeals from decrees judgments or orders for the recovery of money, are dismissed by this Court for want of prosecution, or for failing to file authenticated copies of records as required by law, the Court will award damages against the appellant, at ten per cent. upon the amount recovered in the Court below, if it be less than one hundred dollars, and at five per cent. upon the amount of such recovery, if it equals or exceeds that sum.

XXXIII.

REHEARING—SUPERSEDEAS—STAY OF PROCEEDINGS.

Applications for rehearing will be entertained in that class of cases only in which this Court has final jurisdiction. The manner of applying for a rehearing shall be as follows: within fifteen days after a decision shall have been entered of record, the party desiring a rehearing shall give notice in writing to the opposite party, or to his attorney, of his intention to make such application, and within thirty days after the entry of such decision, shall place on file in the clerk's office five printed copies of the petition and deliver one through the mails, or otherwise, to the opposite party or

Rules of Practice.

attorney, if the address of such party or his attorney can, upon reasonable inquiry, be ascertained.

XXXIV.

Application for a rehearing of and cause shall be made by petition to the Court, signed by counsel, briefly stating the grounds for a rehearing, and the authorities relied on in support thereof. When a rehearing is granted, notice shall be given to the opposite party of the time when such rehearing will be had.

XXXV.

Any two of the justices of the Court may, in vacation, issue an order which shall operate as a supersedeas in any case which has been submitted to this Court for hearing and judgment whenever a re-argument of the same shall, in their opinion, be advisable.

XXXVI.

When a decision shall have been entered of record in vacation, and a petition for a rehearing shall be presented to either of the justices of this Court, if he shall certify that there is probable grounds for granting a rehearing, all further proceedings authorized by the judgment of this Court shall be stayed until the next term of the Court.

XXXVII.

The Clerk of this Court shall at each term docket all petitions for rehearing separate and apart from the trial docket.

XXXVIII.

PRINTER'S FEE.

Upon printed abstracts being furnished in conformity to the rules of this Court, it shall be the duty of the Clerk to tax a printer's fee, at the rate of twenty cents for each one hundred words of one copy of such abstract, against the unsuccessful party as costs, to be recovered by the unsuccessful party furnishing the same.

XXXIX.

PLEAS—TIME FOR FILING.

When a defendant in error or appellee desires to plead instead

Rules of Practice.

of joining in error, he shall file his plea or pleas in the office of the clerk within one day after the time at which the transcript of the record of the court below is required to be filed, unless for cause shown, the time for filing such plea or pleas be extended.

XL.

In all cases where an application is made in vacation for an appeal from this Court to the Supreme Court, the party making such application shall present to one of the judges of this Court a brief statement in writing, giving the title of the cause, the nature and amount of the judgment, order or decree from which the appeal is desired, the date of the rendition of such judgment, order or decree, and the names of the sureties proposed, accompanied with affidavit showing the solvency and sufficiency of the security so proposed.

XLI.

All parties praying an appeal, or prosecuting a writ of error to the Supreme Court, shall present to the Court or judge allowing such appeal, or in case of a writ of error, to one of the judges, a brief statement in writing, stating the points or questions he desires to present to the Supreme Court for review, together with a statement of the parts of the record he desires sent up.

XLII.

EXAMINATION OF LAW STUDENTS.

Examination of applicants for license to practice law shall be had in open Court on the second day of each term.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1877.

THE VILLAGE OF SOUTH EVANSTON
V.
JAMES LYNCH.

INSTRUCTION TO JURY.—The following instruction, even if it stated a correct principle of law, upon which no opinion is expressed, was held erroneous, there being no evidence upon which to predicate it: "The court instructs the jury, that if they believe, from the evidence, that the village of South Evanston, by its agent or agents, procured the defendant to violate the ordinance in question in the manner complained of, then the law is for the defendant, and the plaintiff cannot recover in this action."

APPEAL from the Criminal Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

Mr. E. B. PAYNE, for appellant; upon the question of error in the instruction, and that the village could not so act by its agent, cited *City of Chicago v. Scholten*, 75 Ill. 468; *Town of Odell v. Schroeder*, 58 Ill. 353; *Gillett v. Logan County*, 67 Ill. 256; *Scammon v. City of Chicago*, 44 Ill. 269; *Caldwell v. City of Alton*, 33 Ill. 416; *Perry v. Kinnear*, 42 Ill. 160; *Betts v. Town of Menard*, Breese, 395; *People v. Tazewell County*, 22 Ill. 147; *Petersburg v. Mappin*, 14 Ill. 193; *City of Jacksonville v. McConnel*, 12 Ill. 138; *City of Alton*

The Village of South Evanston v. Lynch.

v. Mulledy, 21 Ill. 76; Doyle v. Wiley, 15 Ill. 576; Jackson v. Cummings, 15 Ill. 449; Fisher v. The People, 23 Ill. 283; Town of St. Charles v. O'Mailey, 18 Ill. 407.

Mr. CHESTER KINNEY, for appellee; that the instruction was correct, cited Allen v. Smith, 3 Scam. 97; Ellis v. Locke, 2 Gilm. 459; Evans v. Fisher, 5 Gilm. 572; Mann v. Russell, 11 Ill. 586; Bloom v. Crane, 24 Ill. 48.

That the court will not disturb the finding of a jury, French v. Lowry, 19 Ill. 158; Bush v. Kindred, 20 Ill. 93; Carpenter v. Ambroson, 20 Ill. 170; Cross v. Carey, 25 Ill. 562; Morgan v. Reyerson, 20 Ill. 343; Martin v. Ehrenfels, 24 Ill. 189; Pulliam v. Ogle, 27 Ill. 189; Millikin v. Taylor, 53 Ill. 509; City of Chicago v. Garrison, 52 Ill. 516; Gallup v. Smith, 24 Ill. 586; De Forest v. Oder, 42 Ill. 500; Am. Ex. Co. v. Bruce, 50 Ill. 201; Hart v. Wing, 44 Ill. 141.

That a corporation may so act by its officers, City of Galena v. Corwith, 48 Ill. 423; Racine & Miss. R. R. Co. v. Farmers Loan & T. Co., 49 Ill. 331; City of Alton v. Mulledy, 21 Ill. 76; Ryan v. Dunlap, 17 Ill. 40; Maher v. City of Chicago, 38 Ill. 266; Bradley v. Ballard, 55 Ill. 413; Chicago Building Society v. Crowell, 65 Ill. 453.

Upon instructions asked by appellant, Adams v. Smith, 58 Ill. 417; T. P. & W. R'y Co. v. Patterson, 63 Ill. 304; Chapman v. Stewart, 63 Ill. 332; Cusick v. Campbell, 68 Ill. 508.

MURPHY, J. This was an action of debt, commenced originally before a justice of the peace, to recover a penalty for violating section 4 of article 1 of an ordinance of said appellant, entitled, "An ordinance concerning misdemeanors."

The trial before the justice resulted in a judgment against the defendant for \$100 and costs, from which an appeal was taken by the defendant to the Criminal Court of Cook county. At the September term of that court, 1877, the case was again tried by the court and a jury, which resulted in a verdict for the defendant.

To reverse the judgment the appellant brings the record to this court, and assigns as error the giving of the following

Kelderhouse v. Saveland.

instruction by the court on behalf of the defendant, to wit :
 "The court instructs the jury, that if they believe, from the evidence, that the village of South Evanston, by its agent or agents, procured the defendant to violate the ordinance in question in the manner complained of, then the law is for the defendant, and the plaintiff cannot recover in this action."

We have carefully examined the record in this case, and find no evidence tending to show that the appellant, by its agents or otherwise, had procured or attempted to procure the violation of said ordinance by said defendant.

We think there is no evidence in the case on which to predicate such an instruction, even though we considered it an annunciation of a correct principle of law, in respect to which we forbear the expression of any opinion. Upon the facts, as shown by the record, it is believed to be error on the part of the court below to give the instruction, which, to say the least, was calculated to mislead the jury; for which the judgment is reversed and the cause remanded.

Judgment reversed and cause remanded.

JOHN KELDERHOUSE

V.

ZACHARIUS SAVELAND.

1. PLEADING AND EVIDENCE—SPECIAL CONTRACT.—In actions upon special contracts, the allegations and proofs must agree, or no recovery can be had.

2. EXECUTORY CONTRACT—DAMAGES—INTEREST.—In an action for breach of an executory contract sounding in damages only, no interest can be allowed on a recovery, under the statute of this State.

3. EVIDENCE.—The admission as evidence of a statute of Wisconsin, incorporating the Chamber of Commerce of Milwaukee, and of certain proceedings before the board of arbitrators of such corporation in respect to the subject matter of this suit, *held* to be error.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Kelderhouse v. Saveland.

Messrs. GARDNER & SCHUYLER, for appellant; that allegations and proofs must agree, cited *Wheeler v. Reed*, 36 Ill. 81; *Taylor v. Riddle*, 35 Ill. 567; *Davidson v. Johnson*, 31 Ill. 523; *Streeter v. Streeter*, 43 Ill. 155; *Spangler v. Pugh*, 21 Ill. 85; *McEwen v. Morey*, 60 Ill. 32; *Tracy v. Rogers*, 69 Ill. 662.

That declaration should have been for breach of contract, 1 Chit. Pl. 350; *Lightfoot v. Creed*, 2 Moore, 255; *Child v. Morley*, 8 T. R. 611; *Durand v. Burt*, 98 Mass. 161; *Russell v. Gilmore*, 54 Ill. 147; *Ward v. Taylor*, 56 Ill. 494; *Seckel v. Scott et al.* 66 Ill. 106; *Meyers v. Schemp et al.* 67 Ill. 469.

No ratification of agency, *Mead v. Brothers*, 28 Wis. 689; *Ladd v. Hildebrant*, 27 Wis. 135; *Ætna Ins. Co. v. Northwestern Ins. Co.* 21 Wis. 458; *Nixon v. Palmer*, 4 Selden, 401; *Rowan v. Hyatt*, 45 N. Y. 138; *Cadwell v. Meek*, 17 Ill. 220; *Mathews v. Hamilton*, 23 Ill. 470; *Williams v. Merritt*, 23 Ill. 623; *Livingston v. Wiler*, 32 Ill. 387; *Man'frs Nat. Bank v. Barnes*, 65 Ill. 69; *Durand v. Burt*, 98 Mass. 161; *Hapless v. Straw*, 10 Leigh, 348; *D'Arcy v. Lyle*, 5 Binney, 441; *Mainwaring v. Bradon*, 8 Taunt. 201; *Powell v. Newburg*, 19 Johns. 287.

Admission of evidence, *Saveland v. Green*, 40 Wis. 431; *Morse on Arbitration*, 519; *Kyd on Awards* 104; *Lady Wenman v. McKenzey*, 5 Ellis & B. 458; *Smith v. Webber*, 1 Adol. & E. 119.

Defective declaration, *Child v. Morley*, 8 T. R. 611; *Powell v. Newberge*, 19 John. 287.

As to agency, *Livermore on Agency*, 54; *Bac. Abr. Authority D.*; *Humble v. Hunter*, 12 Q. B. 310; *Cochran v. Irlam*, 2 M. & S. 301; *Solly et al. v. Rathbone et al.* 2 M. & S. 298; *Schmaling v. Tomlinson et al.* 6 Taunt. 147; *Catlin v. Bell*, 4 Camp. 183; *Story on Agency*, 147; *Long v. Coburn*, 11 Mass. 97; *Stackpole v. Arnold*, 11 Mass. 27; *Frisby v. Stewart*, 5 Sandf. 101; *Loomis v. Simpson*, 13 Iowa, 532; *Bissell v. Roden*, 34 Miss. 64; *Wharton on Agency*, 348.

Right to recover interest, *Rev. Stat.* 614, §§ 2, 3, 4; *Davis et. al. v. Kenaga*, 51 Ill. 170; *Ayers v. Metcalf*, 39 Ill. 307; *Clement v. McConnell*, 14 Ill. 154; *Sammis v. Clark*, 13 Ill. 544.

Kelderhouse v. Saveland.

Mr. F. C. HALE, for appellee; that the verdict should not be set aside, cited *T. W. & W. Ry. Co. v. Moore*, 77 Ill. 217; *Green v. Saveland*, 40 Wis. 431; *Saveland v. Green*, 36 Wis. 612.

Upon admission of evidence and ratification, *Crist v. Wray*, 76 Ill. 204; *Green v. Saveland*, 40 Wis. 431; *Chicago v. Robbins*, 2 Black. 423; *City of Boston v. Worthington*, 10 Gray, 498; *Elliot v. Hayden*, 104 Mass. 182; *Bigelow on Estoppel*, 510; *Law v. Cross*, 1 Black. 539; *Norris v. Cook*, 1 Curtis, 464; *Marshall v. Williams*, 2 Bissell, 256; *Barrett v. Brown*, 105 Mass. 557; *Kelsey v. Nat. Bank*, 69 Penn. 430.

Sufficiency of declaration, *Saveland v. Green*, 36 Wis. 612; *Nash v. Towne*, 5 Wall. 702; *Ford v. Williams*, 21 How. 289; *Oelrichs et al. v. Ford*, 23 How. 63; *Berkley et al. v. Pergrove*, 1 East. 220; *Bachelder v. Fiske*, 17 Mass. 469; *Hoppers v. Straw*, 10 Leigh, 351; *Abraham v. Dunnigan*, 6 Duer, 630; *Taylor v. Stray*, 89 Eng. C. L. 193.

Agency, *Wharton on Agency*, § 316; 2 *Robinson's Prac.* 433; 3 *Jurist*, 364; 1 *Am. Leading Cas.* 870; *Durant v. Burt*, 98 Mass. 161; *Camp v. Bostwick*, 20 Ohio St. 347; *Morris v. Milwaukee Dock Co.* 21 Wis. 133; *Saveland v. Green*, 36 Wis. 612.

HEATON, P. J. This was an action of assumpsit, brought by appellee against appellant, in the Superior Court of Cook county. The declaration contains a special count on a contract alleged to have been made between the parties, and commences with a recital, in substance, that the plaintiff, as agent of defendant, but in his own name, contracted with Geo. J. Jones & Company, of Milwaukee, to charter to said Jones & Co. the defendant's vessel, the *B. F. Bruce*, to carry a load of 45,000 bushels of wheat from Milwaukee to Buffalo, at ten cents per bushel; that said defendant was fully advised of the terms of said agreement, and being so advised, did, on the 30th day of August, 1873, promise and agree to and with the plaintiff that the said vessel should be in Milwaukee to take such load of wheat, on to wit: the 10th day of September, 1873; that said vessel did not go to Milwaukee; that said Jones & Co. were on

Kelderhouse v. Saveland.

said 10th day of September, and for several days thereafter, ready, willing, and offered to furnish said cargo of wheat, to be carried from Milwaukee to Buffalo, and to pay according to agreement; but the defendant not regarding such agreement, neglected to furnish said vessel, and in consequence of such neglect, plaintiff became liable to said Jones & Co. upon his contract so made with them; that said Jones & Co. had to and did charter another vessel, and had to pay an increased rate of 4½ cents per bushel to carry the said wheat; that plaintiff had suffered the amount of such increase of rate in damages for and on account of defendant's failure to keep his said contract with plaintiff. The declaration also contains the common counts. The plea was the general issue, cause tried by a jury, damages assessed in favor of plaintiff, motion for a new trial, and in arrest. Motions overruled, and judgment on the verdict, and for costs. The bill of exceptions purports to set forth all the evidence, but we fail to find the contract alleged to have been made with Geo. J. Jones & Co. by plaintiff, and the telegram alleged to have been first sent by one Bone to plaintiff. On the trial of the cause, the plaintiff offered in evidence a statute of Wisconsin, incorporating the Chamber of Commerce of Milwaukee; also, certain proceedings before the committee of arbitration of said Chamber of Commerce, between the plaintiff and said Jones & Co., in regard to the aforesaid contract between them, in respect to the B. F. Bruce, and the award of the said arbitrators, fixing the amount of said Jones & Co.'s damages for the alleged breach of said plaintiff's contract with them.

It also appears that the court instructed the jury, that plaintiff was entitled to recover interest on the amount of damages paid Geo. J. Jones & Co. by plaintiff, from the time of such payment, if such was the true amount of damages suffered by plaintiff.

The first point we notice is: Was the averment in the declaration, that the defendant had full knowledge of the terms of plaintiff's contract with said Jones & Co., and the further averment that the B. F. Bruce was, by the terms of the contract between plaintiff and defendant, to be at Milwaukee on the 10th of September, to receive said load of wheat, proven? We fail

Kelderhouse v. Saveland.

to find such proof in the record. It was not proved by the telegram, "Bruce is chartered, 10 cents to arrive," without further proof of some trade meaning attached to those words. The question, "When will she be here?" seems not to have been answered, and no time fixed, and no further knowledge upon the subject of plaintiff's contract with Jones & Co. is shown to have been had by defendant; as to what, in fact, were the terms of that contract, does not appear. If the words used in the telegrams had any definite meaning as to time, by the custom of the trade, such meaning should have been proven. We think these allegations in the declaration material, and should have been proved; that the allegations and proof in actions upon special contracts must agree, or no recovery can be had.

The second point we notice is, that a recovery, if had in this case, must be for a breach of an executory contract, sounding in damages only, and on such a recovery no interest can be allowed under our statute. The payment by plaintiff to Jones & Co. of the amount of the award, whether in fact the true amount of plaintiff's damages or not, did not, as between plaintiff and defendant in this case, make such amount liquidated damages. The same could not be recovered as liquidated damages upon the money counts, as so much money advanced by plaintiff to defendant's use, and we think such right to recover upon the money counts a good test in this case of plaintiff's right to recover interest. We therefore think the giving of the instruction was error.

The third point we notice, is the admission of the statutes of Wisconsin, the proceedings before the board of arbitrators of the Chamber of Commerce of Milwaukee, and the award of such board, in evidence. We are unable to discover any legitimate purpose for the introduction of such proof. It was admitted by the court against defendant's objection. We think it tended to, and probably did, fix in the minds of the jury the exact amount of plaintiff's recovery. We cannot say, under all the proof in this case, that it did no harm to defendant. We, therefore, think the admission of such evidence error, and that for these errors the judgment should be reversed and the cause remanded.

Judgment reversed and cause remanded.

 Davison et al. v. Hill.

E. L. DAVISON ET AL.

v.

THOMAS A. HILL.

1	70
46	533
1	70
51	102
53	520

1. PARTIES—MISJOINDER—WHEN NOT TO BE PLEADED.—To recover in actions *ex contractu*, a cause of action must be established against all the defendants, or there can be no recovery against any. A plea verified by affidavit under the 36th section of the Practice Act, denying joint liability, is unnecessary where it affirmatively appears from the plaintiff's testimony that parties are made defendants against whom no cause of action is made out.

2. CONTRACT—RESCISSION—RECOVERY OF MONEY PAID.—Where it appears that the vendor, under a contract to sell real estate, is not in default, the vendee cannot rescind the contract of purchase, and recover back the money paid thereon, unless he first place himself in a position to demand of the vendor a compliance with the terms of the contract on his part, and the vendor refuses.

APPEAL from the Circuit Court of Cook county; the Hon. W. K. McALLISTER, Judge, presiding.

Mr. F. W. S. BRAWLEY, for appellants; upon the question of rescission, cited Addison on Con. 32; Welch v. Dutton, 79 Ill. 465; Bostwick v. Williams, 36 Ill. 65; Wheeler v. Mather, 56 Ill. 241; Weintz v. Hafner, 78 Ill. 27; Selby v. Hutchinson, 4 Gilm. 319; Ehrensperger v. Anderson, 3 W. Hurls. & Gor. 158; Hungate v. Rankin, 20 Ill. 639; Hough v. Rawson, 17 Ill. 588; Addison on Con. 916; 2 Par. on Con. 676; Gerrish v. Maher, 70 Ill. 470; Dart's Vendors and Purchasers, 71; Lord v. Stephens, 1 Young & Coll. 222; Kime v. Kime, 41 Ill. 397.

As to misjoinder of parties, 1 Chit. Pl. 353; Story on Agency, § 263; Wharton on Agency, § 517; Addison on Con. 35; Bamford v. Shuttleworth, 11 A. & E. 926; Horsfall v. Handley, 8 Taunt. 136; Colvin v. Holbrook, 2 Comstock, 126; Wells v. Reynolds, 3 Scam. 191; Griffith v. Furry, 30 Ill. 251; McLean v. Griswold, 22 Ill. 218; Goit v. Joyce, 61 Ill. 489; Archbold's Civil Pl. 71.

Mr. J. C. SCOVEL, for appellee.

Davison et al. v. Hill.

MURPHY, J.—This is an action of assumpsit upon the common counts, brought by the purchaser of real estate, to recover back money which he had paid the vendor, and the case was this: On the 29th day of March, 1873, the following agreement, in writing, was made and entered into between E. L. Davison, by Kerr, Welch & Davison, his agents, and Thomas A. Hill, appellee:

“Memorandum of an agreement entered into this day, between E. L. Davison, of Washington county, Kentucky, and Thomas A. Hill, of the city of Chicago, Illinois, is as follows:

Said Davison hereby agrees to sell and convey, by deed of general warranty, the northwest quarter of section twenty (20), in township thirty-eight (38), north of range thirteen (13), east of third (3d) p. m., in Cook county, Illinois, for the sum of thirty-two thousand dollars (\$32,000), to be paid as follows: Five hundred dollars in hand to bind this contract; seven thousand five hundred dollars twenty days from this date; to assume an incumbrance now on said premises of fifteen thousand dollars, evidenced by trust deeds or mortgages; two thousand dollars October 1st, 1873, with ten per cent. interest, and the balance in one, two and three years from this date, with eight per cent. interest, payable annually. Said Davison agrees to furnish abstract for examination, and if it shows a satisfactory title to said Hill, then he, the said Hill, hereby agrees to pay the above-mentioned sum of money, seven thousand five hundred dollars, and execute his notes and trust deeds for the deferred payments; but if the title should not prove good, then the five hundred dollars now paid shall be returned to said Hill; but if said title proves good, then said Hill shall forfeit said five hundred dollars, as damages, unless he carries out the provisions of this contract. It is further agreed, that if said Hill should elect to take the following terms instead of the foregoing, he shall have the privilege so to do: to pay nine thousand five hundred dollars in twenty days, as same as before stated, and give his notes and trust deeds, payable in sixteen, twenty-four and thirty-six months from this date.

It is further agreed, that the abstract shall be brought down to date; also, that part of the abstract that is placed with the

Davison et al. v. Hill.

loan of eight thousand dollars (\$8,000), shall be returned to Fourth National Bank after the examination, but the continuance from August 6th, 1872, to date, shall be given to said Hill.

In witness whereof, the parties hereunto set their hands and seals, this 29th day of March, 1873.

E. L. DAVISON, [SEAL.]

By Kerr, Davison & Welch, Agents, [SEAL.]

THOS. A. HILL, [SEAL.]”

To recover back the \$500.00 mentioned in the foregoing agreement, as having been paid to “bind the contract,” was the object of this suit in the court below, upon the claim or assumption of the appellee, that he had rescinded said contract, as under the circumstances of the case he lawfully might do. In that court the parties waived a jury, and the cause was tried by the court, which resulted in a judgment in favor of the appellee for \$500.00, to reverse which this appeal is prosecuted.

The first and second assignment of errors present substantially the same questions that, under the evidence submitted at the trial, the judgment should have been for the appellants.

Under the view taken of the case by the court, the consideration of the 3d and 4th assignment of errors will be unnecessary.

In support of these alleged errors, it is insisted by the appellants that there is a misjoinder of parties defendants, which is fatal to the action. By the contract put in evidence by the appellee, it will be seen that it purports in express terms to be a contract between E. L. Davison of the one part, and Thomas A. Hill of the other, Davison’s name being signed thereto “by Kerr, Davison & Welch, his agents”; and still we find these agents made defendants to the suit along with E. L. Davison, and upon the written contract thus executed, as the only evidence in the record of any contract between the parties, judgment is rendered against them in the court below. This, we think, was error.

It is an elementary principle of procedure that the proofs and allegations must always agree, and that to recover in actions *ex contractu*, a cause of action must be established against all the defendants or there can be no recovery against any. This is a doctrine taught by all the text writers who treat of the subject, and seems to be followed by all the adjudicated

cases to which we have been referred: Wells v. Reynolds, 3 Scammon, 191; Griffith v. Furry, 30 Ill. 251; McLean v. Griswold, 22 Ill. 219. The latest case in our own court seems to be the case of Goit v. Joyce, 61 Ill. 489, all holding that to recover against any one of the defendants, a cause of action must be averred and proved against all of them. But it is claimed by the appellee, that by section 36 of the Practice Act of our statute, in force July 1st, 1872, the rule of the common law in this regard has been changed, and that unless in actions against two or more defendants, they file a plea, verified by affidavit, denying the joint liability, judgment must go against all, if any, notwithstanding the plaintiff's own evidence discloses the fact, in the first instance, that certain of the defendants are not liable at all.

We think the statute sufficiently radical in its innovations upon well established principles, without according to it so broad a scope as that; and are of opinion that where it appears, as in this case from the plaintiff's testimony, that parties are made defendants against whom it affirmatively appears that there is no cause of action made out, then no such plea is necessary from the defendants to enable them to avail themselves of the misjoinder at the trial, and that in such case the statute has no application.

The remaining question is whether appellant was so in default as to authorize the appellee to rescind the contract and recover back the money paid thereon.

We think not. From the facts as shown by this record, it will be observed that there is no time expressly fixed by the contract within which Davison was to convey the land; but twenty days being fixed for the payment of \$7,500 on the purchase price by Hill, at which time he was to assume certain encumbrances then on the property, to the amount of \$15,000, and secure the balance of the price on the premises by mortgage, we infer that the intention of the parties was that the conveyance should be then made, if the title was found good.

From the evidence, it appears that on the nineteenth or twentieth day from the date of the contract, the appellee handed L. A. Davison, the agent of E. L. Davison, the opinion of his

Brown v. Luehrs.

(Hill's) attorneys, noting that the title of E. L. Davison to the land was good, subject to certain encumbrances, to wit: the release of two mortgages, defective, as they claimed, two trust deeds, both of which, by the terms of the contract, Hill was to assume and pay, and that, if living, Mrs. Jared Arnold might have right of dower. The agent, L. A. Davison, testified that at that time he had in his possession releases of the mortgages, perfectly executed. He also testifies that he showed them to Hill, and asked him (Hill) to whom he would have the deed made; that Hill replied to him that he did not want the land at all. Appellee did not make the point of objection that Mrs. Arnold might have dower in the property; if he had, appellant might have promptly removed the objection, to his (Hill's) entire satisfaction: *Bostwick v. Williams*, 36 Ill. 65; but, on the contrary, informed the agent of the appellant, E. L. Davison, "that he did not want the land at all," and tendered a quit-claim deed, re-conveying to E. L. Davison any rights he might have acquired under the contract. We think, to rescind the contract, he should, at least, have been able and willing to pay the \$7,500, and offered in good faith to do so, and demanded from Davison a deed of the premises, which, if he had then declined to give, he (Hill) might have rescinded the contract; but as it was, we think he was not in condition to enable him to do so, and as a consequence, could have no recovery of the money paid. The learned judge who presided at the trial below, took a different view, and held the contract rescinded, which we think was error. For these reasons the judgment of the court below is reversed, and cause remanded.

Judgment reversed.

JOHN A. BROWN

v.

FREDERICK H. LUEHRS.

1	74
101a	274

IMPEACHMENT OF WITNESS.—It is not an imperative rule that impeaching testimony should relate to the character of the witness for truth and

Brown v. Luehrs.

veracity at the time and place where he lived when he gave his testimony. General reputation at a former period and in another neighborhood, may or may not tend to prove that issue, according to the remoteness of the time and place, and other circumstances.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. HENRY C. WHITNEY, for appellant; that the evidence offered was admissible, cited, *Holmes v. Stateler*, 17 Ill. 453.

Messrs. BARNUM & VAN SCHAACK, for appellee; that evidence offered must relate to time of giving the testimony, cited *Wharton's Ev.* § 563; *Willard v. Goodenough*, 30 Vt. 393; *Teese v. Huntington*, 23 How U. S. 2; *Webber v. Hankle*, 4 Mich. 198; *Chance v. Indianapolis, etc. Gravel Co.*, 32 Ind. 472; *Rucker v. Beatty*, 3 Ind. 70; *State v. Howard*, 9 N. H. 486; *Morris v. Palmer*, 15 Penn. St. 56; *Rogers v. Lewis*, 19 Ind. 405; *City of Aurora v. Cobb et al.* 21 Ind. 510; *Curtis v. Fay*, 37 Barb. 64; *Henderson v. Hayne*, 2 Met. 342.

That a new trial will not be granted for the purpose of impeaching a witness, *McWilliams v. Morgan*, 61 Ill. 89; *Martin v. Ehrenfels*, 24 Ill. 187; *O'Reiley v. Fitzgerald*, 40 Ill. 310; *Seward v. Cease*, 50 Ill. 228.

PLEASANTS, J. Appellee brought this suit to recover money alleged to have been inadvertently overpaid to appellant, then his creditor, under circumstances not necessary to be here detailed—except that it was claimed to have been left by him in the fall of 1870 with the firm of Moeller & Busch, or one of them, at their store in Chicago, and by them or him on the next day, according to direction delivered or caused to be delivered to appellant. The cause was tried early in September last, and there was a verdict for the plaintiff for \$607.45.

On a former trial, it was for the defendant, on his plea of set-off for the amount therein claimed, which necessarily involved a finding against the alleged payment through Moeller & Busch. The material testimony on that trial was given by

Brown v. Luehrs.

said Moeller & Busch, on behalf of the plaintiff, admitting the receipt by them, or one of them, of the sum of one thousand dollars in question for that purpose, and tending to show its payment over to the defendant,—and by the defendant, in his own behalf, denying such payment over.

Upon bill filed, alleging newly discovered evidence of one M. G. Cowles, a book-keeper of Moeller & Busch at the time, and the person who, it was averred, delivered the money to the defendant, and his deposition in support of said bill, taken at Dubuque, Iowa, where he then resided, in March, 1875, that verdict was set aside and a new trial awarded.

On the second trial this deposition was offered and read in evidence by the plaintiff, and is conceded to be decisive unless the deponent can be generally impeached.

With a view to such impeachment the defendant called C. A. Pulsifer, who testified that he was a commission merchant, resident in Chicago for the last ten years; had known Cowles probably three years; two or three; in 1871 or 1872; employed him as book-keeper from January to May, 1872; had not seen him since 1872 or 1873; knew his acquaintances and associates, business men with whom he came in contact, and his general reputation for truth and veracity among them.

He was then asked the question: "Was that reputation good or bad?" to which objection was made, on the ground that a proper foundation for it had not been laid, and because it did not relate to the time when, and the place where the deposition was taken.

The court sustained the objection, stating that "the impeaching testimony ought to relate to the character of the witness for truth and veracity at the place where he lived when he gave his deposition, and amongst those he was in the habit of associating with."

To this ruling exception was duly taken, and the trial proceeded to verdict, as above stated. A motion by the defendant for a new trial was overruled, judgment entered on the verdict, and appeal taken.

We are of opinion that the Superior Court erred in excluding the question put to the witness Pulsifer, under the circumstances.

The object of impeaching testimony is to aid the jury in ascertaining the degree of credit due to the witness in question, so far as it may depend on his character for truth. In reason it must be his character at the time of giving his testimony. If it were certainly made known that at the moment of testifying it was good or otherwise, it would be wholly immaterial to inquire what it was at any time before or after. The issue, therefore, relates to that precise time, and hence the form of the question, as a rule, relates to it, and to the neighborhood where he then resided. That form generally bears most directly upon the issue, since impeaching witnesses generally, in fact, testify at the same trial, which is practically at the same time, with the witness sought to be impeached, and in the neighborhood where he then resides, and has whatever reputation he does have. But in some cases that reason of the rule fails, and therefore the rule, as to the form of the question, is not inflexible. He may have no actual reputation at the time of testifying, in the neighborhood where he then resides, and yet have a marked reputation in another neighborhood, where he formerly resided. The question must be such in form as calls for an answer relevant to the issue.

General reputation at a former period and in another neighborhood may or may not tend to prove that issue, according to the remoteness of the time and place, and other circumstances. Ordinarily these will affect the weight, but not the competency of the matter. Every witness testifying to the reputation of another from what he knows of the speech of people, must necessarily refer to a past time. It has often been said, and with no little force, that it ought to be a time anterior to the controversy. The subject is necessarily within the sound legal discretion of the Court, and no time or place can be fixed as a limit to the inquiry.

It was well said, in *Willard v. Goodenough*, 30 Vt. 393, that evidence of character at a former period, "as a distinct and independent proposition"—that is, as we understand it, without regard to its tendency or want of tendency to prove that character at the time the witness testified—is inadmissible. And this explains the cases cited by counsel, in which the

McCoy et al. v. The Appleby Manufacturing Co.

courts have excluded such evidence. It was offered to prove that fact as a distinct and independent proposition, or the time was so remote as, under the circumstances, to warrant the court, in the exercise of a sound legal discretion, in regarding it as having no tendency to prove the character of the witness at the time he testified.

These views seem to us to be sustained by reason and authority: *Teese v. Huntingdon*, 23 How. 14; *Holmes v. Stetler*, 17 Ill. 453.

In the case at bar, while the foundation for the question under consideration was not laid with the nicest care, it was sufficient. Pulsifer, in substance, stated that he was acquainted with the general reputation of Cowles for truth and veracity among his associates and acquaintances in the neighborhood where he then resided, which was some three years or less before his deposition was taken. That neighborhood was the one in which the trial was pending. The record does not show where Cowles resided between the time of his removal from Chicago, in Sept., 1872, and a time shortly before his deposition was taken, in March, 1875. When he so removed he was upwards of thirty years of age, and his character may be fairly presumed, in the absence of proof to the contrary, to have become well fixed. Under these circumstances, we think that evidence of his general character at that time legally tended to show what it was when his deposition was taken, and ought to have been admitted. For its exclusion, which we deem error the judgment will be reversed and the case remanded.

Reversed and remanded.

ALEXANDER MCCOY ET AL.

v.

THE APPLEBY MANUFACTURING CO.

CORPORATE PURPOSES—EMPLOYMENT OF ATTORNEYS TO WIND UP AFFAIRS OF CORPORATION.—The defendant was a corporation. One of its directors and the acting president became involved in a difficulty as to co-

McCoy et al. v. The Appleby Manufacturing Co.

porate affairs, with the other-directors, resulting in a suspension of the business of the corporation. The treasurer and all the other directors employed plaintiffs as attorneys, to counsel and assist the company in respect to the difficulty with the president, and to transact the legal business of the company. Plaintiffs, in the course of such employment, filed a bill to close up the affairs of the company. *Held*, that the services rendered in closing up the affairs of the corporation were for a corporate purpose, and should be paid out of the corporate funds.

ERROR to the Circuit Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

Messrs. MCCOY & PRATT, for plaintiffs in error; upon the question of performance of services, cited *Ex parte* Plitt et al. 2 Wall. Jr. 453, and cases there mentioned.

Mr. JOHN I. BENNETT, for defendant in error Appleby.

MURPHY, J. This is a petition filed by the plaintiffs in error against the defendant in error, on the 24th day of June, 1877, to recover pay for their services theretofore rendered to, and performed, for said defendant, as attorneys at law and solicitors in chancery, in and about the affairs of said company, from and after the 15th day of June, 1875, up to the time of filing said petition.

It appears from the record in this case that a certain portion of the alleged bill accrued to, and the services were performed by, the law firm of Harding, McCoy & Pratt, to wit: the sum of \$1,036.00, but that by the terms of the dissolution of said firm in December, 1875, these petitioners succeeded to the business and rights of the former firm, and became entitled, as a consequence, to any benefits which arise from this claim of \$1,036.00, so claimed for the services of Harding, McCoy & Pratt. In addition to said sum, petitioners claim the further sum of \$2,457.50, for additional services rendered by them for said defendant by the present firm of McCoy & Pratt, as per bills rendered and attached to said petition, designated as Exhibit A and B, respectively. These claims are objected to by Richard B. Appleby, one of the stockholders of said defendant, and interested in its affairs, upon the grounds that the services

McCoy et al. v. The Appleby Manufacturing Co.

rendered by said petitioners were not for a corporate purpose, and therefore are not properly chargeable to said corporation. From the record, it appears that the Appleby Manufacturing Company was a corporation existing under the laws of this State, located and doing business in the city of Chicago ; that Richard B. Appleby was director and acting president of said company, when, on the 15th day of June, 1875, a difficulty arose between the president and the corporation, he assuming title to a large part of the corporate property in his individual right, which, in the opinion of the other directors and stockholders, was inconsistent with the interests of the company, and his duty to it as its president. At this time the difficulty had become so violent as to have caused the entire suspension of the business of the company; that on that day, Walter S. Babcock, treasurer, and all the directors, except said Appleby, called upon and employed the then firm of Harding, McCoy & Pratt, not only to counsel and assist the company in respect to the difficulty with its then president, but to do and perform any and all the business of the company which might require the assistance of legal advisers.

Under this employment the firm of Harding, McCoy & Pratt embarked in the business, and continued to transact it until the following December, when Mr. Harding went out of the firm, since which time the petitioners have continued to transact the business of the company until the bill made up of apparently reasonable charges has reached the large sum now claimed by the petitioners. It is not seriously contended, as we understand counsel, that the charges are, of themselves, unreasonable as to the *amount*. The point made against them is, that the services for which they are charged was not corporate, but individual in its character. Upon the determination of that question must depend the decision of the case. From this record it appears that they transacted a large amount of business for said company. One very important service they rendered, the corporate character of which, we think, ought not to be questioned, was, to file a bill in chancery in the name of Walter S. Babcock, but at the instance and employment of all the directors and stockholders, except said Ap-

McCoy et al. v. The Appleby Manufacturing Co.

pleby, to dissolve the corporation and close up its affairs, and upon the hearing of that bill with the cross-bill filed by Appleby, the court properly adjusted the equities between the stockholders, and decreed a dissolution of the corporation.

It is conceded by counsel that under these proceedings to close up said corporation, there is now a fund in the hands of the court below, belonging to said corporation, abundantly large to pay the bill of the petitioners, after paying and discharging all the other debts and liabilities of said company, if it be proper to charge the same against said corporation. Upon the proof submitted before the master, it seems to us clear that the services were rendered for and on behalf of the corporation, and are properly chargeable to the fund now in the court below, and that the master's report should have been approved. The court below entertained different views, and sustained exceptions to said report, except as to \$150.00. This, we think, was error, and for which the decree of the court below is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—APRIL TERM, 1878.

JAMES H. HILDRETH

V.

MONROE HEATH ET AL.

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1. MANDAMUS—WILL NOT LIE TO COMPEL THE CITY COUNCIL TO ADMIT A MEMBER.—Whenever the act sought to be enforced requires the exercise of *discretion*, the remedy by mandamus will not lie. The power of the city council to judge of the election and qualification of its members, involves the exercise of *judgment* and *discretion*, and their determination in that respect cannot be revised by a mandamus.

2. DISQUALIFICATION—CONVICTION OF CRIME.—A section in the charter of the city of Chicago declares that no person shall be eligible to the office of alderman * * * * “if he shall have been convicted of malfeasance, bribery, or other corrupt practices or crimes.” *Held*, that this should be limited to convictions under the laws of the State of Illinois, and conviction in the courts of the United States, of an offense created by an act of Congress, does not constitute a disqualification under this section.

3. PARDON—REMOVAL OF DISQUALIFICATION.—*Held*, that the pardon, by the President of the United States for the offense of which plaintiff was convicted, removed and cured his disqualification and ineligibility, if any existed.

ERROR to the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. LAWRENCE, CAMPBELL & LAWRENCE, and CHARLES

Hildreth v. Heath et al.

H. REED, for plaintiff in error; as to mandamus being an appropriate remedy, cited 1 Dillon on Mun. Cor. §§ 141, 142; *Ex parte* Heath, 3 Hill (N. Y.) 42.

Against ineligibility by reason of conviction of an offense, Conkling's Treatise, 178-183.

As to effect of pardon, *Ex parte* Garland, 4 Wall. 380; Osborn v. United States, 1 Otto, 477.

Mr. JOSEPH F. BONFIELD, for defendants in error; that mandamus is not the proper remedy, cited High on Extraordinary Remedies, §§ 24, 325; Cooley's Con. Lim. Chap 6, 133; McCrary on Elections, §§ 328, 331; Kelly v. City, 62 Ill. 279; People ex rel. v. Metzker, 47 Cal. 524; Mayor v. Rainwater, 47 Miss. 547; Swann v. Grey, 44 Miss. 393; Davis v. The Mayor, 1 Duer. 499; People ex rel. v. Common Council, 18 Mich. 338; Duffield's Case, Brightly's Leading Cases, 646; Peabody v. School Com. 115 Mass. 383; 2 Dillon on Mun. Cor. § 669.

As to effect of pardon, Foreman v. Baldwin, 24 Ill. 306; Duncan v. Commonwealth, 4 Serg. & Rawle, 451.

BAILEY, J.—This was a petition filed in the court below by James H. Hildreth, the plaintiff in error, against the mayor and aldermen of the city of Chicago, for a mandamus, to compel them to admit the petitioner as a member of the city council of said city.

The petition alleges that on the 3d day of April, 1877, an election of city officers was held in said city, and that the law required that at said election some person should be elected by the qualified voters of the 7th ward of said city to fill the office of alderman for that ward; that at said election the petitioner was a candidate for that office, and was eligible thereto, and that he received at said election the highest number of votes of the legal voters of said ward for alderman, and was thereby duly and lawfully elected to that office; that the ballots were duly canvassed and returns made, showing that petitioner had received a plurality of the votes cast; that he took and subscribed in due form of law his oath of office, and presented

Hildreth v. Heath et al.

himself at a regular session of said council as an alderman elect, and respectfully requested to be admitted as a member of that body, but that said council wrongfully, unlawfully, arbitrarily, and without any sufficient cause or reason, refused and declined to admit him.

The answer admits the petitioner was a candidate for said office, and received a plurality of the legal votes cast at said election, but avers that at that time, and at the time he presented himself to the city council and demanded to be recognized as a member, he was and ever since has been, ineligible to that office; that previous thereto he had been indicted and convicted in the District Court of the United States for the Northern District of Illinois, for malfeasance in office while holding the office of internal revenue gauger in and for the first collection district of Illinois, and upon which conviction the petitioner was sentenced to pay a fine of \$3,000 and costs, the sentence of imprisonment being suspended; that said offense was, under the circumstances, one of great turpitude, involving not only malfeasance in office and willful neglect of duty, but bribery and corruption; that said city council investigated the matter of petitioner's eligibility to said office, and all the circumstances attending the same, and adjudged and declared that, in consequence of such conviction, he was ineligible to the office of alderman, and disqualified to hold such office.

The answer sets out the following provisions of the charter of the city of Chicago, to wit:

"No person shall be eligible to the office of alderman unless he shall be a qualified elector and reside within the ward for which he is elected. * * * Nor shall he be eligible if he shall have been convicted of malfeasance, bribery or other corrupt practices or crimes."

Also, "The City Council shall judge of the election and qualification of its own members."

It is further averred, that the question of the eligibility of the petitioner to said office was referred by the City Council to its judiciary committee, in connection with the corporation counsel, who took the matter under advisement and examined the record of said conviction; that petitioner appeared before said

Hildreth v. Heath et al.

committee in person and by counsel, and presented a written argument in support of his eligibility, and that the committee, after fully examining all the circumstances, submitted a report adverse to the petitioner, and that thereupon said council, by a vote of 17 yeas and 4 nays, adopted the following preamble and resolution:

“WHEREAS, it appears from a canvass of the returns of votes cast in the 7th ward for the office of alderman, at the city election held on the 3d day of April, A. D. 1877, that James H. Hildreth received a plurality of the votes cast in said ward for alderman; and whereas, it further appears from the report of the judiciary committee of this council, that the said James H. Hildreth was, prior to said election, convicted in the District Court of the United States for the Northern District of Illinois, of malfeasance in office; therefore, be it

“*Resolved*, That said James H. Hildreth, by reason of such conviction, is, and he is hereby declared to be, ineligible to hold said office of alderman from the 7th ward of the city of Chicago, and that he is not entitled to a seat in the City Council.”

To this answer petitioner filed a replication, averring that since said conviction, and prior to said election, the petitioner had been granted a full pardon for the offense of which he was convicted, which pardon had been accepted by him.)

To this replication a demurrer was interposed by the defendants below, which demurrer was sustained by the court; and the petitioner, electing to abide by his replication, judgment was rendered against him, dismissing his petition and for costs. To reverse this judgment this writ of error is prosecuted.

The main question to be considered is, whether a mandamus will lie to compel the city council to admit the petitioner as a member of that body.

It is well settled that whenever the act which the petitioner seeks to have performed requires the exercise of *discretion*, this remedy will not lie: *Kelly et al. v. The City of Chicago et al.* 62 Ill. 279; *The People, ex rel. etc. v. Williams et al.* 55 Id. 178. And where the law, imposing a duty upon a municipal corporation, makes the performance thereof discretionary with its authorities, a writ of mandamus to compel perform-

Hildreth v. Heath et al.

ance will not lie; but if there is no discretion to act, it is otherwise. *City of Ottawa v. The People, ex rel. etc.* 48 Id. 233.

The principle is, we think, well stated in High on Extraordinary Remedies, Sec. 24, as follows:

“But the most important principle to be observed in the exercise of the jurisdiction by mandamus, and one which lies at the very foundation of the entire system of rules and principles regulating the use of this extraordinary remedy, is that which fixes the distinction between duties of a peremptory or mandatory nature, and those which are discretionary in their character, involving the exercise of some degree of judgment on the part of the officer or body against whom the mandamus is sought. This distinction may be said to be the key to the extended system of rules and precedents forming the law of mandamus, and few cases of applications for this extraordinary remedy occur which are not subjected to the test of this rule. Stated in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance; but that as to all acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required, mandamus will not lie.” See, also, *Swann v. Gray*, 44 Miss. 392; *Mayor v. Rainwater*, 47 Id. 547; *People ex rel. v. Metzger*, 47 Cal. 524.

It cannot be doubted that in this case the city council had, under the provisions of the city charter, a power to pass upon and determine the election and qualification of its members, involving the exercise of *judgment* and *discretion*, and which was *quasi* judicial in its nature. Had they refused to act at all, they might perhaps have been compelled by mandamus to proceed to determine the election and qualification of a member, but the result to which they might arrive when once put in motion could not be determined in a proceeding of this character. That must still be left to their discretion. Any other rule would take from them their discretion altogether, and make their duties purely ministerial.

Nor do we perceive that any different rule applies after they

Hildreth v. Heath et al.

have exercised their discretionary power and performed their *quasi* judicial functions, and reached a conclusion. Such conclusion may be erroneous, but the liability to errors, both of fact and of law, is necessarily incident to the exercise of a discretion. A writ of mandamus can no more be employed to correct an error after it has been committed, than to prevent the commission of an error by directing in advance what decision shall be rendered.

But it is insisted on behalf of plaintiff in error, that the section of the city charter which declares a person to be ineligible to the office of alderman, who has been convicted of malfeasance, bribery, or other corrupt practices or crimes, should be limited by construction to convictions under the laws of the state of Illinois, and that conviction in the courts of the United States of an offense created by an act of congress, cannot under this section be held to constitute a disqualification. We are inclined to hold that the construction of the charter here contended for by counsel for plaintiff in error, is the correct one, and that the city council, in adopting the contrary construction, committed an error of law.

Plaintiff in error further insists that the President's pardon, set up in his replication, removed and cured his disqualification and ineligibility, if any such existed, and that the city council should have so held. In this we are inclined to think he is correct, and that the city council decided erroneously in adopting the contrary view of the law. These were all matters, however, fairly within the purview of judgment and discretion, and upon which the minds of men might fairly and honestly arrive at different conclusions. The determination of these questions was, we think, fairly within the power vested in the city council by the charter. They having considered them and reached the conclusions which have seemed to them correct and sound, their determination cannot now be revised by a mandamus.)

We are not inclined to hold that the discretion vested in the city council by the charter was so far exclusive as to oust the courts of all jurisdiction over the subject matter thereby submitted to the judgment of the city council. In a proper pro-

Pease v. Catlin.

ceeding the plaintiff in error doubtless might obtain relief against errors of law committed against him by the council in its decision, but we do not think he has employed the appropriate remedy in this case.

In *People ex rel. etc. v. Head*, 25 Ill. 325, the court held that mandamus is not the proper writ by which to try and finally determine the right of a party to an office, but that the proper mode of trying such right is by *quo warranto*.

In *People ex rel. etc. v. Common Council of Detroit*, 18 Mich. 338, a relator, who claimed to have been elected by the common council to the office of assessor, and was wrongfully deprived of the office by the refusal of the council to count the vote of one of the members in his favor, applied for a mandamus to compel them to count such vote and declare him elected, and the court held that mandamus was not a proper proceeding in that case, and declined to make an order to show cause.

We are of opinion that no error was committed by the court below in sustaining the demurrer to the replication and rendering judgment, dismissing the petition, and consequently we affirm the judgment.

Judgment affirmed.

SAMUEL W. PEASE

V.

CHARLES CATLIN.

1. NEW PROMISE—EVIDENCE IN SUPPORT OF—INTENTION OF PARTIES.—Suit was brought upon a promissory note, to which the maker of the note pleaded a discharge in bankruptcy and the Statute of Limitations. To these pleas a replication of new promise was made, and issue joined. To support the replication of a new promise, evidence was introduced showing that the payee of the note had received from the maker the note of a third party for \$100, which he had endorsed as part payment on the original note. The maker of the note testified that the note for \$100 was given as an accommodation, an act of friendship, and was not intended to be, nor considered as a partial payment of the original note, which was not denied: *Held*, that the

Pease v. Catlin.

evidence failed to show any promise whatever which, in law, would revive a right of action once lost, either by lapse of time or discharge in bankruptcy.

2. INSTRUCTIONS—MUST BE BASED UPON THE EVIDENCE.—An instruction that “where a payment is made by a debtor to a creditor, who holds two or more claims against such debtor, the debtor has the right at the time of making payment, to direct on what debt it shall apply; but if he fails to direct the application of such payment, then the creditor may apply it to whatever debt he sees proper,” pre-supposes or assumes that there is some evidence in the record that at the time of the transaction in question, the creditor held more than one claim against the debtor, and there being no evidence tending to establish such fact, there is nothing on which to predicate such an instruction, and it is erroneous.

Quere.—Even though there had been evidence of two or more claims, and the \$150 note had been intended by the party as part payment of said indebtedness, and no direction given by the party paying as to what particular indebtedness the payment was to be applied on, it may well be doubted whether that is such an act as a promise can be inferred from to pay the balance of any particular indebtedness on which the creditor may choose to indorse the same.

ERROR to the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. ELDRIDGE & TOURTELLOTTE, for plaintiff in error; that the promise by which a discharged debt is revived must be clear, distinct and unequivocal, cited *Allen v. Ferguson*, 9 B. R. 471; 18 Wall. 1; *Fraley v. Kelly*, 67 N. C. 78; *Linton v. Stanton*, 4 La. An. 401; *Branch Bank v. Boykin*, 9 Ala. 320; *Stern v. Nussbaum*, 47 How. Pr. 489; *Goxtkheimer v. Keyser*, 11 Penn. 364; *Pratt v. Russell*, 7 Cush. 462; *Bennett v. Everett*, 3 R. I. 152; *Porter v. Porter*, 31 Me. 169.

Partial payments on a debt are not in law a promise to pay the debt; neither is the payment of interest: *Stark v. Stinson*, 23 N. H. 259; *Viele v. Ogilvie*, 2 Greene, 326; *Cambridge Inst. v. Littlefield*, 6 Cush. 210.

Mr. FRANK J. LOESCH, for defendant in error; argued that where the question is one of credibility or contrariety of testimony, it is within the province of the jury to determine, and the verdict should not be set aside, and cited *Germania Ins. Co. v. Hutchberger*, 1 Chicago L. J. 62; *Simons v. Waldron*,

Pease v. Catlin.

70 Ill. 281; Classen v. Schoenemann, 80 Ill. 304; Chapman v. Burt, 77 Ill. 337; Marshall v. Tracy, 74 Ill. 379.

That proof of payment of part of a debt barred by the Statute of Limitations, will revive the debt, and is sufficient evidence from which a jury may infer a promise to pay the balance: Mellick v. DeSeelhorst, Breese, 221; Ilsley v. Jewett, 2 Met. 168; Smith v. Ryan, 66 N. Y. 352.

And that the same rule will apply to debts barred by discharge in bankruptcy: Marshall v. Tracy, 74 Ill. 379; Classen v. Schoenemann, 80 Ill. 304.

MURPHY, P. J. This is an action of assumpsit, commenced in the court below upon a promissory note, bearing date the 2d day of April, 1857, given by the plaintiff in error, Pease, to A. F. Devereux, and by him assigned to the defendant in error, April 5th, 1875.

The trial below resulted in a verdict and judgment on the note against the plaintiff in error for \$344.00, to reverse which judgment this writ of error is prosecuted. To the declaration the plaintiff filed four pleas: 1st, non-assumpsit; 2d and 3d, discharge in bankruptcy on the 9th day of October, 1868; and 4th, the Statute of Limitations. To the 2d and 3d pleas, the defendant in error replied, a new promise to pay the note since such discharge in bankruptcy, to wit: On the 5th day of April, 1875. To the 4th plea, that the cause of action mentioned in the declaration did accrue within sixteen years next before the commencement of the suit. To the replication to the 2d and 3d pleas, the plaintiff rejoined that he did not ratify and confirm said promises and undertakings, and make said new promise as alleged. Upon the trial of these issues by a jury, a verdict was obtained by the plaintiff in error in the court below.

It is assigned for error: first, that the verdict is contrary to, and not supported by, the evidence. It is also assigned for error, the giving by the court of instructions asked by the defendant in error, and in refusing to give the instruction asked by the plaintiff in error, and in modifying the same, and giving said instruction so modified.

We have examined the record in this case carefully, and find

Pease v. Catlin.

that Devereux, the payee of the note, left Chicago in the fall of 1857, taking this note with him, and never saw the plaintiff in error from that time until the spring of 1875. At that time Devereux called upon the plaintiff, in straightened circumstances, and applied to him for help to some money. One hundred and fifty dollars was indicated as the amount desired, but in his testimony does not pretend that he asked the plaintiff for payment on this note, but appealed to him in the name of old friendship, to assist him, which the plaintiff agreed to do provided he could make collection of some money then due him.

Soon thereafter Devereux called again upon the plaintiff in error, who being unable to make collection, procured from one of his debtors a note for \$150, due in sixty days, which he let Devereux have to assist him. This note last named being against one W. P. Wright, Devereux, on his return home to Fort Wayne, where he then resided, and where the note sued upon was indorsed upon it a payment of \$150, by way of the Wright note so obtained. And it is insisted by the defendant that this is such a partial payment of the note as takes it out of the Statute of Limitations, and the operation of the discharge in bankruptcy.

There is no doubt as a proposition of law, that if the plaintiff in error had passed the Wright note to Devereux as part payment of the note sued on, and it had been so agreed by the parties at the time, it would have operated to revive the same; and on that question, the judgment would be right. But the defendant's evidence taken alone, uncontradicted, fails to show that to have been the agreement of the parties. The defense of the Statute of Limitations and discharge in bankruptcy are not defenses which commend themselves to the favorable consideration of juries, and particularly to the latter. The natural repugnance which pervades the minds of all honest men to any proceeding by which men are enabled to repudiate, and be relieved from the honest and faithful performance of their obligations fairly entered into, has probably performed an important part in the deliberations of this jury. There indeed seems little else to explain the finding, as the record discloses no evi-

Pease v. Catlin.

dence whatever of any promise by the plaintiff in error to pay the note.

Devereux and Fulton, who alone were present with Pease at these interviews, fail to state in their testimony that there was any such agreement at or before the time Devereux got the Wright note. Pease, the only other party present, testifies positively that no such agreement was made; further, that the note was not to be so applied as a part payment of this note sued upon.

This being all the testimony on the subject of the new promise, we think it fails to show any promise whatever which in law would revive a right of action once lost, either by the lapse of time or discharge in bankruptcy.

On the trial in the court below, the court gave to the jury the following instruction, at the instance of the plaintiff:

“The jury are instructed, as a matter of law, that where a payment is made by a debtor to a creditor, who holds two or more claims against such debtor, the debtor has the right at the time of making payment to direct on what debt it shall apply; but if he fails to direct the application of such payment, then the creditor may apply it to whatever debt he sees proper, provided he so applies it within a reasonable time after payment made, and does no injustice to his debtor.

“If, therefore, the jury believe, from the evidence, said Devereux had two or more claims against said defendant, action on which was barred by the Statute of Limitations, or by defendant's discharge in bankruptcy, and had no other claims against the defendant, and the defendant, within sixteen years next before commencement of this suit, and subsequent to his discharge in bankruptcy, and having in mind the note sued on, as well as other debts to Devereux, gave said Wright note to A. F. Devereux in part payment of such claim or claims held by said Devereux, and due from defendant, and defendant did not direct to what claim the said payment should be applied, then said Devereux could apply said payment (if the jury believe, from the evidence, defendant actually intended to make a payment on said claims), to any claim due from said defendant to Devereux.

Pease v. Catlin.

“And if the jury further believe, from the evidence, said Devereux duly applied said Wright note in part payment of the note here sued on, then the plaintiff is entitled to recover any balance found to be due thereon;” which was excepted to by the defendant below, who requested the court to give the following instruction:

“If the jury believe, from the evidence, that the note of \$150, given to A. F. Devereux about April 5th, 1875, was an accommodation, and not for the purpose or with the intent of a payment on the \$250 note sued on, then the jury must find for the defendant; if they also believe, from the evidence, that the defendant was duly discharged in bankruptcy;” which the court refused to do, but modified and changed the same so as to read as follows, and gave the same to the jury:

“If the jury believe, from the evidence, that the note of \$150, given to A. F. Devereux about April 5th, 1875, was an accommodation, and not for the purpose or with the intent of a payment on the \$250 note sued on, *or other claim of Devereux*, then the jury must find for the defendant; if they also believe, from the evidence, that the defendant was duly discharged in bankruptcy;” to which the defendant also excepted.

These instructions, as given, pre-supposes or assumes that there is some evidence in the record that at the time of this transaction, that is, April 5th, 1875, Devereux held more than one claim against Pease. We find no evidence tending to prove such fact in this record; as a consequence, no evidence on which to predicate such an instruction. We think the instruction as asked by the defendant below, should have been given. That the modification by the court, and the giving the 3d instruction asked by the plaintiff below, embracing the same principle was error. Even if there had been evidence of two or more claims in the hands of Devereux at the time he received the Wright note, still we think it may well be doubted; even though the Wright note had been intended by the parties as part payment of said indebtedness, and no direction given by the party paying as to what particular indebtedness the payment was to apply, whether that is such an act as a promise can be inferred from, to pay the balance of any particular in-

Race et al. v. Sullivan.

debtedness, on which the creditor may choose to indorse the same.

We have been referred to no such case, and upon principle, we think no such inference warrantable. We think, therefore, that the verdict was unsupported by the evidence, and that the court erred in giving the plaintiff's third instructions, and refusing to give the defendant's instruction, as asked, and in giving it in its modified form. For these errors, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

RICHARD T. RACE ET AL.

v.

JAMES SULLIVAN.

1. INTEREST—WHEN NOT ENTITLED TO.—The petitioner made no claim for interest in his petition. *Held*, to be error in the Circuit Court to award interest when none was claimed in the petition.

2. MECHANIC'S LIEN—PARTIES.—In proceedings to enforce a mechanic's lien, all persons whose interests, either legal or equitable, direct or remote, may be affected by the decree, should be made parties, and it affirmatively appearing by the petition that certain persons named were interested in the premises: *held*, that the decree was erroneous, because it was rendered without such persons having been brought into court.

3. AWARDING EXECUTION FOR BALANCE.—An execution for the balance due after deducting the proceeds of the sale under the decree, should be awarded against such defendants only as might be held to pay such balance in an action at law; and in determining such parties the court must be guided solely by the averments of the petition. Resort cannot be had to proof taken before the master to cure any infirmities in the petition.

ERROR to the Circuit Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

Mr. DAVID S. PRIDE, for plaintiffs in error; that allegations and proof must correspond, and complainant is not entitled to relief unless there are averments in his bill to support the evidence, cited *Heath v. Hall et al.* 60 Ill. 344; *House v. Davis*,

Race et al. v. Sullivan.

60 Ill. 367; Cronk v. Trumble, 66 Ill. 428; Tracy v. Rogers, 69 Ill. 662; Page et al. v. Greeley, 75 Ill. 400.

As to allowance of interest, Mills v. Heeney, 35 Ill. 173; Prescott v. Maxwell, 48 Ill. 82.

As to decree, Kinney v. Sherman, 28 Ill. 521; Bush v. Connelly, 33 Ill. 448.

Upon the question of awarding execution for balance after sale of the premises, Delahey v. Clement, 3 Scam. 201; Stephens v. Holmes, 64 Ill. 336; Rothgerber v. Dupuy, 64 Ill. 452; Canisins v. Merrill, 65 Ill. 67.

That the court should have set aside the decree, because the property was sold for a grossly inadequate sum, and because it was brought to the notice of the court that the property was owned by minors, Thomas v. Hebenstreit, 68 Ill. 115; Hartman et al. v. Hartman, 59 Ill. 103; White et al. v. Glover, 59 Ill. 459.

Mr. SAMUEL M. BOOTH and FRANK J. LOESCH, for defendant in error; upon the question of variance between the allegations and proof, cited Hopkins v. Snedaker, 71 Ill. 449; Stanley v. Valentine, 79 Ill. 544.

That the objection comes too late in this court, Tug Boat Dorr v. Waldron, 62 Ill. 221; Mains v. Cosner, 62 Ill. 465; Semmes v. United States, 1 Otto, 21; Wood v. Farnell, 50 Ala. 546; Mitchell v. Milhoam, 11 Kan. 617; Thompson v. Hoagland, 65 Ill. 310; Reynolds v. Palmer, 70 Ill. 288; Allen v. Nichols, 68 Ill. 250; Allen v. Payne, 45 Ill. 339.

As to allowance of interest, Rev. Stat. chap. 74, § 2; Albee v. Wachter, 74 Ill. 173.

That a proceeding for a mechanic's lien is not entirely *in rem*, Gould v. Garrison, 48 Ill. 258; Clark v. Moore, 64 Ill. 273; Rev. Stat. chap. 82, §§ 9, 25.

The court did not err in refusing to set aside the default and decree, Lynn v. Boilvin, 2 Gilm. 629; Iglehart v. Marine Ins. Co. 35 Ill. 514; Schneider v. Seibert, 50 Ill. 284; Bowman v. Bowman, 64 Ill. 75; Terry v. Trustees of Eureka Coll. 70 Ill. 236; Freibroth v. Mann, 70 Ill. 523; Rev. Stat. chap. 22, § 18.

That parties against whom no decree is taken cannot object,

Race et al. v. Sullivan.

Hawke v. Snyder, 10 Chicago L. N. 181; Rowand v. Carroll, 81 Ill. 224; Fonville v. Sausser, 73 Ill. 451; Richards v. Greene, 78 Ill. 525; Clark v. Marfield, 77 Ill. 258; Henrickson v. VanWinkle, 21 Ill. 274.

As to awarding execution for balance, Eames v. Germania Turn Verein, 74 Ill. 54; Rev. Stat. chap 11, § 34.

BAILEY, J. On the 9th day of January, 1874, the defendant in error filed in the court below his petition for a mechanic's lien, therein alleging that on the 20th day of November, 1872, Richard T. Race, and Susan A. Race, were owners in fee of lots 22 and 23, in block 39, in the N. E. $\frac{1}{4}$ of Sec. 22, Town 40 N., R. 13, E. of 3d P. M., in Irving Park, in the county of Cook; and that on that day the petitioner and Richard T. Race, one of the plaintiffs in error, entered into a written agreement, by which the petitioner agreed to erect and complete a dwelling house on said lot 22, according to certain plans and specifications, the same to be completed on or before April 1st, 1873. This written agreement, a copy of which is made a part of the petition, purports to be an agreement between James Sullivan of the one part, and R. T. Race & Co. of the other part.

The petition avers that in and by said agreement said Richard T. Race, "by the name of R. T. Race & Co.," promised and agreed to pay the petitioner for erecting said house the sum of \$3,000, to be paid in a certain specified manner; that said contract was signed by said Richard T. Race, with the name of R. T. Race & Co., but that the petitioner contracted with Richard T. Race alone, and if other persons associated in business with him were interested in said transactions, the petitioner did not know it at the time said contract was made.

It is further averred that by a subsequent arrangement between the petitioner and said Richard T. Race, the house was actually erected on lots 22 and 23, and that it was fully completed about June 1st, 1873; that in building said house, the petitioner, at the request of said Richard T. Race, did certain extra work not embraced in the original agreement, amounting to \$359; and that at the time of filing the petition there

Race et al. v. Sullivan.

was due the petitioner for the work done under said contract, and for such extra work, the sum of \$1,182.50; that since said money became due, the petitioner had frequently demanded payment of the same of said Richard T. Race, who had wholly failed and refused to make such payment; that said building was erected with the knowledge, approbation and consent of said Susan A. Race, and for the joint use and benefit of said Richard T. and Susan A. Race.

The petition further sets up, as an excuse for the non-completion of the building within the time stipulated, that the work thereon was delayed and the completion thereof deferred, at the request of said Richard T. Race. It then avers "that Everet Chamberlin, Charles T. Race and Stephen A. Race, claim to have some interest in said land and building, and he therefore makes them parties defendant to this suit."

The petition prays for process of summons against Richard T. Race, Susan A. Race, Everet Chamberlin, Charles T. Race and Stephen A. Race, and for the benefit of a mechanic's lien on said land and building, and for a sale of the same to pay petitioner's said demand and costs, and a general prayer for relief.

On the filing of the petition, a summons was issued and returned not served. On the 3d day of May, 1876, an alias summons was issued against all the defendants named in the petition, and was returned served on Richard T., Charles T., and Stephen A. Race, and "not found" as to the other two defendants.

The defendants thus served were afterwards defaulted, and the petition taken as confessed by them, and the suit referred to the Master to take proofs. Before the Master the petitioner proved by his own testimony that the firm of R. T. Race & Co. consisted of Richard T. Race, Susan A. Race, Charles T. Race and Stephen A. Race; and in answer to a question whether any members of said firm besides Richard T. Race had "recognized said contract," he answered that he had made demands upon Charles T. and Stephen A. Race at various times for the balance due him under said contract, and they admitted the amount claimed—\$1,182.50—to be due, but wished Richard T.

Race et al. v. Sullivan.

who attended to the business of the firm, to settle it; and that Stephen A. Race told petitioner that he wished the claim was settled, as he could not obtain a settlement of the copartnership affairs until it was.

Upon the coming in of the Master's report, the court rendered its decree, finding that the defendants, Richard T., Stephen A., Charles T. and Susan A. Race, made with the petitioner the said contract for the erection of said dwelling house, and that there was then due the petitioner by the terms thereof the sum of \$1,182.50, and interest thereon at six per cent. from October 2d, 1873, making a total of \$1,454.42, and decreeing a lien on said premises "for the amount so found to be due from the defendants, Richard T., Charles T. and Stephen A. Race, and that the defendants, Richard T., Charles T. and Stephen A. Race, or some of them, pay said sum," etc., within a time limited by the decree, or in default of such payment the said premises be sold, etc., and that in case, after the proper application of the proceeds of such sale, any portion of the sum decreed to be paid to the petitioner should remain unsatisfied, the sum so remaining should stand as a judgment at law in favor of the petitioner, and against said defendants, Richard T. Race, Stephen A. Race and Charles T. Race, and that execution issue thereon as on a judgment at law.

Said premises were afterwards exposed for sale by the master, in pursuance of said decree, and were struck off and sold to the petitioner for \$50; and upon confirmation of the master's report of sale, showing a deficiency of \$1,444.92, it was ordered that an execution in favor of the petitioner and against the property of the defendants, Richard T. Race, Charles T. Race and Stephen A. Race, issue for that amount.

Various errors are assigned, but we deem it necessary to consider only the following:

Complaint is made, that in computing the amount due the petitioner, interest was allowed him by the court at six per cent. from October 2d, 1873, to January 9th, 1874, the date of filing the petition. This we think was error. There is no claim for interest in the petition, the petitioner praying only for a decree for the principal sum then claimed to be due. It

Race et al. v. Sullivan.

is true the sum owing him appears to have become due and payable October 2d, 1873, and under a proper state of pleadings he might have been entitled to interest at six per cent. from that date. But having made no claim for interest in his petition, he should have been permitted to recover only the principal sum due him, and six per cent. interest from the date of filing the petition. *Mills v. Heeney*, 35 Ill. 173; *Carter v. Lewis et al.* 29 Id. 500.

It is next objected that the decree is erroneous for want of necessary parties. It is a well established rule that in proceedings to enforce a mechanic's lien, all persons whose interests, either legal or equitable, direct or remote, may by any possibility be affected by the decree, should be made parties. *Kimball v. Cook*, 1 Gilm. 423; *Williams v. Chapman*, 17 Ill. 423; *Lomax et al. v. Dore et al.* 45 Id. 379. By section 13 of the chapter of the Revised Statutes, relating to mechanic's liens, it is provided that parties in interest, within the meaning of said act, shall include all persons who may have any legal or equitable claim to the whole, or any part of the premises upon which a lien may be attempted to be enforced, under the provisions of said act. By section 12 all such parties in interest have a right on their own motion, to become parties to the proceeding, and we think it follows, as a consequence, that they should be made parties at the instance of the petitioner if their names and interests are known to him, or are disclosed in the course of the proceeding.

In this case, it affirmatively appears by the petition that at the time the building contract in question was made, Susan A. Race was a joint owner with Richard T. Race of the premises on which the building was to be erected, and that the building was erected with her knowledge, approbation and consent, and for the joint use and benefit of herself and said Richard T. Race. Not only is this true, but the decree finds, as a matter of fact, although it is not so averred in the petition, that the contract under which the building was erected was actually made with the petitioner by Richard T., Stephen A., Charles T. and Susan A. Race, under the firm name of R. T. Race & Co. Manifestly Susan A. Race should have been made a party.

Race et al. v. Sullivan.

The petition further discloses the fact that Everet Chamberlin claimed an interest in said land and building. Such being the case, the petitioner, before taking his decree, should have brought said Chamberlin before the court, so that his interest might have been ascertained and protected.

It should be observed, that both Susan A. Race and Everet Chamberlin, were named as defendants in the petition, and process was issued against them but no service was had, and the decree was rendered without having them brought before the court. It is the duty of a complainant to see and know that he has before the court all necessary parties, or his decree will not be binding; and where he takes a decree without making the necessary parties defendants to his bill, where the necessity of their being made parties is disclosed, the decree will be reversed. *Hopkins et al. v. Roseclare Lead Co.* 72 Ill. 373.

It is further objected that the decree is erroneous in awarding execution against Charles T. Race and Stephen A. Race, for the balance due the petitioner after deducting the proceeds of the sale of the premises affected by the lien. It is true the statute, to obviate the necessity of resorting to an action at law for the recovery of such balance, authorizes the court, upon ascertaining the same, to award execution therefor upon the decree. But against whom should such execution be awarded? manifestly against such defendants only as might be held to pay such balance in an action at law.

In determining the party against whom the execution should have been awarded in this case, we must be guided solely by the averments of the petition. The decree must depend for its validity upon the case there made, and no resort can be had to the proofs taken before the Master to cure any infirmities in the petition. According to the petition, Richard T. Race, and he alone, was the person with whom the petitioner made the contract, and he alone is personally liable to the petitioner thereon. There is no pretense in the petition that any contract was entered into by Stephen A. Race or Charles T. Race, but directly the contrary is averred. They were under no personal liability to the petitioner. The mere fact that they

Stein v. Kendall.

claimed some interest in the land and building, which is the only fact alleged against them, fails to establish such liability. The decree in awarding execution against them is clearly erroneous.

For the errors above indicated, the decree is reversed and the cause remanded.

Reversed and remanded.

PHILIP STEIN

V.

MARTHA H. KENDALL.

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91	808

1. BILL OF EXCEPTIONS—WHEN TO BE FILED—PRESUMPTION.—It will be presumed that the judge would not have signed a bill of exceptions unless it was presented to him in proper time, and whatever delay may have intervened after it was signed and before it was filed, will be presumed to have been occasioned by the pressure of other engagements on the part of the judge, or his failure to deliver it to appellant for filing, and not by any neglect of the appellant. The burden of establishing such neglect, if any exists, is on appellee.

2. SIGNING IN VACATION.—It is immaterial whether, at the time the order to file the bill *nunc pro tunc* was made, the court was in session or not; the presumption is that it was presented to the circuit judge within the thirty days, and that for reasons for which he alone is responsible, it was not actually filed until after the thirty days had expired.

APPEAL from the Circuit Court of Cook county; the Hon. W. K. McALLISTER, Judge, presiding.

Mr. PHILIP STEIN, *pro se*.

Mr. A. C. STORY, for Appellee.

BAILEY, J. In this case, appellee moves to strike from the record the bill of exceptions, on the ground that it was not *filed* within the time prescribed by the court below for that purpose. It appears that the judgment was rendered in the Circuit Court, on the 20th day of October, 1877, and that appel-

Stein v. Kendall.

lant was allowed thirty days from that day to file his bill of exceptions. The bill of exceptions purports to have been signed and sealed by the Circuit Judge, on the 7th of November, which was within the thirty days, but was not actually filed with the clerk of the court below until November 26th, which was seven days after the expiration of said thirty days.

When filed, it appears to have been accompanied by a written order of the Circuit Judge, directing the clerk to file it *nunc pro tunc*, as of November 7th, and it was so filed. We are furnished with a certificate of the Circuit Clerk, that from October 20th down to a date considerably later than November 26th, the Circuit Judge, who rendered the judgment and signed the bill of exceptions, held no session of his branch of the Circuit Court.

It should be observed that there is no proof before us, fixing the date at which the bill of exceptions was presented to the Circuit Judge, or tending to explain the delay in filing it after the day it purports to have been signed. The Circuit Judge having, upon his official responsibility, signed the bill of exceptions, under date of November 7th, and ordered it to be filed as of that day, in the absence of proof explaining the delay, every presumption and intendment will be indulged in to support it. We must presume that the judge would not have signed it unless it was presented to him in proper time, and whatever delay may have intervened after it was signed, and before it was filed, will be presumed to have been occasioned by the pressure of other engagements on the part of the judge, or by his failure to deliver it to appellant for filing, and not by any neglect on the part of appellant. The burden of establishing such neglect, if any exists, is on the appellee.

As we view the rules of practice, then, we do not consider it material whether, at the time the order to file the bill of exceptions *nunc pro tunc* was made, the court below was in session or not, nor whether such order was, or was not, valid, as an order of court. Nor do we consider it material, as the proof before us now stands, whether the 7th or 26th of November is to be regarded as the true date of filing the bill of exceptions. The presumption is, that it was presented to the

Stein v. Kendall.

Circuit Judge within the thirty days, and that for reasons for which the Circuit Judge alone was responsible, it was not actually filed until after the thirty days had expired.

The motion to strike the bill of exceptions from the record will be overruled.

PHILIP STEIN
v.
MARTHA H. KENDALL.

1. SPECIAL CONTRACT—EVIDENCE.—The only evidence to prove the special contract relied on by the defense, was the testimony of appellee herself, that Mrs. Stephani informed her that appellant would make collections for appellee for ten per cent. There was no evidence that appellant agreed to or even knew of the representations of Mrs. Stephani to appellee. Appellant denied making any such contract. *Held*, that the evidence was incompetent, and failed to establish the claim of appellee as to the specific agreement.

2. AGENCY—RATIFICATION.—Before a person can be held to have ratified by his conduct the voluntary act of another, done for his benefit, it must appear that he acted with full knowledge of all the material facts and circumstances connected with the assumed agency.

3. INSTRUCTIONS.—The following instruction asked by appellant was proper and should not have been refused: "On behalf of plaintiff the court further instructs the jury to disregard and pay no attention whatever to that part of the evidence which relates to the terms on which it is claimed Mrs. Stephani stated to the defendant, Mrs. Kendall, that the plaintiff would take the claims for collection."

APPEAL from the Circuit Court of Cook county; the Hon. W. K. McALLISTER, Judge, presiding.

Mr. PHILIP STEIN *pro se*; upon the question of evidence as to a special agreement and pretended agency of Mrs. Stephani, cited, Grafton Bank v. Woodward, 5 N. II. 301; Story on Agency, § 45; 2 Greenl. Ev. § 60; Worman v. Boyer, 14 Serg. & Rawle, 212; Mendith v. Footner, 11 M. & W. 204; Essington v. Neill, 21 Ill. 139; Trepp v. Baker, 78 Ill. 146; Yazel v. Palmer, 81 Ill. 82; Mussey v. Buchu, 3 Cush. 517;

Stein v. Kendall.

Brigham v. Peters, 1 Gray, 145; Story on Agency, § 136; 2 Starkie on Ev. "Agent" 60; Maxey v. Heckethorn, 44 Ill. 437; Fairlee v. Hastings, 10 Vesey, 127; Trustees v. Bledsoe, 5 Ind. 133; Scott v. Cram, 1 Conn. 155; Plumstead's Lessee v. Rudebaugh, 1 Yeates, 502; James' Lessee v. Stookey, 1 Wash. C. C. 330; Garth v. Howard, 8 Bing. 451; Hannay v. Steward, 6 Watts, 489; Whiteside v. Margarel, 51 Ill. 507; 1 Greenl. Ev. § 113; Jenks v. Burr, 56 Ill. 450.

Upon the question of instructing the jury: Mitchell v. The Town, 61 Ill. 174; Farwell v. Meyer, 35 Ill. 40; Mathews v. Hamilton, 23 Ill. 470; Man'f. Nat. Bank v. Barnes, 65 Ill. 69; Story on Agency, § 239; Andreas v. Ketcham, 77 Ill. 377; Evanston v. Lynch, 10 Legal News, 70; Wray v. C. B. & Q. R. R. 10 Legal News, 169; Hinman v. Pope, 1 Gilm. 131; Watt v. Kirby, 15 Ill. 200; Union Nat'l Bank v. Baldenwick, 45 Ill. 375; Mussey v. Beecher, 3 Cush. 518; Paley on Agency, 199; Story on Agency, 127; Parsons v. Armor, 3 Pet. 413.

Mr. A. C. STORY, for appellee; upon the question of instructions to the jury, cited, De Clerq v. Mungin, 46 Ill. 112; Murray v. Haverty, 70 Ill. 318; White v. Stanbro, 73 Ill. 575; Wiggins' Ferry Co. v. Higgins, 72 Ill. 517; Beseler v. Stephani, 71 Ill. 400.

Upon the question of exclusion and admission of testimony, Brown v. People, 8 Hun. N. Y. 564; Jackson v. Osborne, 2 Wend. 555; People v. Gray, 7 N. Y. 378; Lipe v. Eisenleid, 32 N. Y. 229; Story on Agency, § 132; Ind. & St. L. R. R. Co. v. Miller, 71 Ill. 463; Morris v. Tillson, 81 Ill. 607; Darst v. Gale, 83 Ill. 136; Cairo & St. L. R. R. Co. v. Mahoney, 82 Ill. 73; Allin v. Millison, 72 Ill. 201; Hungate v. Reynolds, 72 Ill. 425; Parsons on Con. 44; Veasie v. Williams, 8 How. 134; Dunlap's Paley on Agency, 172; 1 Greenl. Ev. 140, § 113.

MURPHY, P. J. This was an action commenced originally before a justice of the peace by appellant, to recover for professional services claimed by him to have been rendered for the appellee. In the justice's court he recovered a judgment for

Stein v. Kendall.

§35.25. The defendant appealed to the Circuit Court of Cook county, where a trial *de novo* was had, resulting in a judgment in favor of the defendant. The plaintiff brings the case to this court, and asks the reversal of the judgment on the grounds that the court permitted improper testimony to be given to the jury by the appellee at the trial below, and the giving of an instruction by the court, and also refusing certain instructions asked by the plaintiff below.

It appears that in the winter of 1874-'75, the appellee placed in the hands of the appellant, who was then a practicing attorney in the city of Chicago, several small bills for collection, which appear to have accrued to the appellee in the course of her business as a dressmaker, which business she, during that time, carried on. It appears that the appellant commenced and pressed the collection of these bills with varied success, succeeding in some instances and failing in others. That when finally he presented his bill for his services, the appellee set up and claimed a special agreement in respect to the price she was to pay for such services. It is claimed by the appellee that one Mrs. Stephani, at and immediately preceding the time when she placed these bills in the hands of the appellant for collection, induced her to do so by representing to her that she had talked with the appellant, and that he had agreed to take the bills for collection and charge only ten per cent. upon such sum as he collected.

That at this time appellant was a boarder in the house of Mrs. Stephani, and that she and Mrs. Stephani were intimate friends, and that relying upon such representations she, the appellee, placed said bills in the hands of the appellant for collection.

Upon the trial in the court below, appellee being on the stand as a witness, was asked by counsel to state the conversation which took place between her and Mrs. Stephani at her house, in the winter of 1875, in respect to placing these bills in the hands of appellant, he not being present.

This was objected to by appellant, and over his objection it was allowed to go to the jury.

In this conversation, Mrs. Stephani informed her, the appel-

Stein v. Kendall.

lee, that Mr. Stein would collect the bills for ten per cent. upon such sum as he collected, that being all he charged Mrs. Stephani. She, Mrs. Stephani, offered to see and ask him if he would take these bills on these terms, to which she responded: "I asked her to do so." On the next day she came to the appellee and told her she had seen Mr. Stein about the matter, and he would do the business on the terms indicated—that is, ten per cent. on the sum actually collected.

A few days after this the appellee had these accounts made out, and gave them to Mrs. Stephani for Mr. Stein, to collect on these terms. She says: "I told her I did not consider my bills good enough to pay regular lawyers' prices." Admitting this testimony to go to the jury over the objection of the appellant, is assigned for error by him. This appears to be the only evidence in the record tending to establish any special contract as to the price to be paid by the appellee for such services.

Upon this question the appellant testifies that he did not hear this conversation between Mrs. Stephani and the appellee, nor did he know or hear of its occurrence until after the entire performance of his services in the premises.

That he never authorized Mrs. Stephani to procure any business for him, or make any representations in his behalf as to the price he would charge.

It appears to have been entirely without any authority from appellant, that Mrs. Stephani went to and talked with appellee. But it is insisted by the appellee that the appellant must be held to have ratified the act of Mrs. Stephani as his agent, because he took and kept the business. This proposition appears to be fully answered by the uncontradicted testimony of the appellant, that he did not know or hear anything about any such representations until after he had presented his bill for payment.

Before he could be held to have ratified any action of Mrs. Stephani, it must first be shown that he acted advisedly in the premises; that is, that he had a full knowledge of all the material facts and circumstances of the case. The proof utterly fails to show that he knew of any of the false representations

Stein v. Kendall.

made to the appellee in respect to his charges, and of course could not be said to be acting with a view to them.

We think the evidence of the above conversation, in the absence of the appellant, upon a familiar principal of law, is incompetent, and the objection to which should have been sustained, and that the overruling of which was error.

This being the only evidence in the record tending to establish a special contract, there is no evidence on which to predicate the following instruction:

“If the jury find, from the evidence, that Mrs. Stephani volunteered to act on plaintiff’s behalf, to obtain from defendant the bills in question, to be put in plaintiff’s hands for collection, and in doing so Mrs. Stephani told a falsehood to defendant with the intent of so obtaining said business for plaintiff, but agreed with defendant on behalf of plaintiff that the terms should be 10 per cent. on the amount collected; if, then, the plaintiff got said bills under such circumstances as that, he knew it was solely through the agency of Mrs. Stephani, and thereupon accepted such employment, then the court instructs you that the plaintiff, if he so accepted the bills of account for collection through such agency, is bound by the means used by Mrs. Stephani in obtaining such business for him and by the special contract, if any, which she made with defendant,” by the court, which assumes that the jury might find such contract to have been proven. We think the instruction was calculated to mislead the jury. In the light of these views, we think the following instruction, asked by appellant, should have been given:

“On behalf of plaintiff, the court further instructs the jury to disregard and pay no attention whatever to that part of the evidence which relates to the terms on which it is claimed Mrs. Stephani stated to the defendant, Mrs. Kendall, that the plaintiff would take the claims for collection.”

For these errors, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

Garland et al. v. Peeney, use, etc.

JOHN C. GARLAND ET AL.

V.

BENJAMIN PEENEY, use, etc.

1. COVERTURE—PROMISE BY WIFE—COMMON LAW RULE.—The declaration declared specially upon a promise made by the defendants to pay for materials furnished in erecting the dwelling house of the defendant, Helen L. Garland; *held*, that at common law such a promise was not obligatory upon the wife, because of her legal incapacity to make it; that the fact of coverture showed a misjoinder of parties, and the plaintiffs should have been non-suited.

2. REMOVAL OF DISABILITY—ACTS OF 1861 AND 1869—BURDEN OF PROOF.—The acts of 1861 and 1869, by implication, empowered a married woman to make contracts relating to her separate property, but her power at law to make binding agreements was still exceptional, more like that of an infant. The presumption was still against her legal capacity, and it was incumbent upon a person seeking to charge her upon such a contract, to show affirmatively that it related to her separate property, acquired in one of the ways mentioned in the statute, and was within the exception which gave her capacity.

3. DECLARATION—INSUFFICIENT AVERMENT.—The declaration was upon a promise to pay for materials and work for "the dwelling house of the defendant, Helen L. Garland." This is insufficient, for want of a further averment, that the house was acquired by her *in some of the ways* mentioned in the acts above referred to. The promise declared on was absolutely void in law, as to her, by reason of her coverture.

4. PLEADING—MISJOINDER—DENIAL OF JOINT LIABILITY.—The statute, requiring defendants to make denial of joint liability by verified plea, is not intended to forbid such question to be raised in any other manner by defendants, but merely to relieve the plaintiff of the common law burden of proving it in the first instance. The plea of the general issue required of the plaintiff proof tending to show a contract that would charge both defendants, and if it appeared that one of the defendants was incompetent to contract, that fact must defeat the action.

5. MISCONDUCT OF JUROR.—The record presented some facts tending to show misconduct on the part of one of the jurors, and rulings of the court in relation thereto, but upon this question the court states no opinion.

ERROR to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. BARNUM and VAN SCHAACK, for plaintiff in error; as to capacity of defendant, Helen L. Garland, to contract, and

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46	350
46	363
46	533
1	108
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53	520

Garland et al. v. Peeney, use, etc.

that plaintiff should prove her property was acquired as mentioned in the statute, cited, *Carpenter v. Mitchell*, 50 Ill. 470; *In re Bradwell*, 55 Ill. 535; *Cookson v. Toole*, 59 Ill. 515; *Thomas v. Lowy*, 60 Ill. 512; *Conkling v. Dougl*, 67 Ill. 355; *Schmidt v. Postel*, 63 Ill. 58; *Reeves v. Webster*, 71 Ill. 307; *Johnson v. Johnson*, 72 Ill. 489; *Farrell v. Patterson*, 43 Ill. 52.

That coverture could be shown under the general issue, *Streeter v. Streeter*, 43 Ill. 155; *Thomas v. Lowy*, 60 Ill. 512; *McLean v. Griswold*, 22 Ill. 218; 1 Chit. Pl. *476.

That recovery must be had against all defendants or none, *McLean v. Griswold*, 22 Ill. 218; *Thomas v. Lowy*, 60 Ill. 512; *Griffith v. Furry*, 30 Ill. 251.

As to misconduct of juror, *Stampofski v. Steffens*, 79 Ill. 303; *Tewsbury v. Sperry*, 9 Legal News, 382; *Blalock v. Phillips*, 38 Ga. 221; *Oliver v. Trustees*, 5 Cowen, 283; *Bennett v. Howard*, 3 Day (Conn.) 223; *Dana v. Roberts*, 1 Root (Conn.) 134; *Bow v. Parsons*, 1 Root (Conn.) 429; *Bullock v. Hosford*, 2 Root (Conn.) 349; *Foster v. Brooks*, 6 Ga. 298; *Martin v. White*, 2 Scam. 69.

Mr. WALTER B. SCATES, for defendant in error. As to capacity of married woman to contract, cited, Rev. Stat. 576, § 7; Id. 577, § 9; Id. 280, § 38; Id. 622, § 3; Id. 497, §§ 1, 2; Id. 665, § 2; Id. 423, § 1.

As to denial of joint liability and proof of coverture, Rev. Stat. 779, § 35; *Work v. Cowhick*, 81 Ill. 317.

PLEASANTS, J. In the Superior Court of Cook County the defendant in error, who was plaintiff there, recovered a judgment against the plaintiffs in error, in assumpsit, jointly, upon a verdict for \$1,785.00; and the main question here is whether such a case was made, at least as against the defendant Helen L. Garland, as was necessary to support it.

The declaration contained a special count and common counts. By the former it was averred that on the first day of June, 1872, the defendants made a verbal contract with the plaintiff, whereby he undertook to furnish suitable material and the planing-mill work upon the same, of "certain portions of the dwelling-house

Garland et al. v. Peeney, use, etc.

of the said defendant, Helen L. Garland," and in consideration thereof the said defendants "verbally undertook," and promised the plaintiff to pay him therefor the sum of four thousand dollars, etc.

Defendants severally pleaded the general issue, and it appeared by the proof that at the time of making the contract, which was in June, 1872, and for years before, and ever since, they were husband and wife, and so residing together.

At common law, the promise in such a case was not obligatory upon a married woman. The plaintiff could never have had a cause of action upon it as against her, because of her legal incapacity to make it. The fact of coverture *at the time* was, therefore, admissible in evidence under the general issue: 1 Ch. Pl. marg. pp. 476-'7, and *Streeter v. Streeter*, 43 Ill. 155; and its effect was to wholly defeat the action. It showed a misjoinder of parties, for which the plaintiff must have been nonsuited: 1 Ch. Pl. 44.

Was not such its proper legal effect in the case at bar? When the promise in question was made, if it was ever in fact made by the defendant, Helen L. Garland, the common law disability of coverture in this State had been in part removed. The acts of 1861 and 1869, by implication, empowered a married woman to make contracts relating to her separate property and earnings, acquired as therein described. But notwithstanding these acts and the disposition of the courts to give them a liberal construction, we are of the opinion that her power at law to make binding agreements, was still exceptional. Her case was made more like that of an infant, to which also the rule above stated was applicable, although he could bind himself by certain contracts, as for necessities. So as to a married woman. The presumption was still against her legal capacity, and it was incumbent on her, when she sought to enforce her supposed contract, or upon the adverse party when he sought to charge her by it, to show affirmatively that it related to such property so acquired, and thus was within the exception which gave her capacity, and not within the rule which denied it: *Farrell v. Patterson*, 43 Ill. 52; *Reeves v. Webster*, 71 Ill. 307; *Carpenter v. Mitchell*, 50 Ill. 470; *Cookson v. Toole*, 59 Ill. 515; *Thomas*

Garland et al. v. Peeney, use, etc.

v. Lowy 60 Ill. 512; Halley v. Ball, 66 Ill. 250; Conklin v. Doul, 67 Ill. 355; Haight v. McVeagh, 69 Ill. 624; Husband v. Epling, 81 Ill. 172.

That she may be precluded from showing the fact as a defense, by the form of the issue made, as in Work v. Cowhick, 81 Ill. 317, or estopped by her own acts *in pais*, as in Nixon v. Halley, 78 Id. 611, also show the rule; and the enlargement of her capacity by the act of 1874, inapplicable to this case, because not passed until long after the transaction, was a legislative recognition of it.

The declaration alleges that the promise in this case was to pay for material and work for "the dwelling house of the defendant, Helen L. Garland," but that, in our judgment, is insufficient to bring it within the exception. If it had also disclosed the fact that she was, at the time, the wife of her co-defendant, it would have been demurrable for want of further averment that said house was acquired by her *in some of the ways mentioned* in the acts above referred to. The result, however, is the same, since the fact of coverture is abundantly proved, and to meet it, we discover in the record no evidence tending to show that the property was hers *and so acquired*. Indeed, we find but one item legally tending to show that it was hers at all. For the purpose of contradicting the plaintiff as to some statements made by him as a witness on the trial, he was asked upon cross-examination, if he had not made different statements in a petition filed by him under the Mechanics' Lien Law, for the same claim, and a portion of said petition was offered and read in evidence on the part of the defendants, whereupon the whole of it was offered on the part of the plaintiff, and admitted, and was found to contain an averment that she was the owner in fee of the lot, and had been ever since the year 1871. This must be regarded, under the circumstances, as evidence of the lightest kind, and it is greatly outweighed by the proof to the contrary. Nor do we perceive that so far as affects this case, there is any substantial difference of presumption as to the ownership of real estate and of personal property, in the joint possession of husband and wife. For, although there may be a difference in the strength of them in favor of the husband, there is

Garland et al. v. Peeney, use, etc.

simply no presumption at all in either case, in favor of the wife.

Our conclusion, then, upon this point, is that the promise declared on, if in fact made by Mrs. Garland, was absolutely void in law as to her, by reason of her coverture.

But, furthermore, we find no evidence that she ever, in fact, made it or joined with her husband in it. On the contrary, the plaintiff himself testified that the verbal contract was made between himself and Mr. Garland, "individually." That she suggested alterations in the plan, specially affecting her convenience as his wife and housekeeper, and knew of the work as it progressed, are just as consistent with the supposition that she did not take part in making the contract, as that she did.

Counsel for the defendant in error, while admitting the rule in reference to the effect of coverture, and its admissibility under the general issue to be at common law as above stated, insists that in this case that fact, proved under the general issue, is not pertinent; that it traverses no allegation which is put in issue by that plea; that it goes only to the joint liability of the defendants, and should therefore have been pleaded in abatement, or in a special plea in bar, denying such liability, and verified pursuant to § 36 of the Practice Act.

We are of a different opinion. The provision referred to seems to us not absolutely to forbid any question by the defendants, or either of them, of their joint liability, without such verified plea, but merely to relieve the plaintiff of the common law burden of proving it "in the first instance." Some effect must be given to the words quoted. The construction contended for by counsel ignores them. In our view, the plea of the general issue required of the plaintiff some proof tending to show a contract substantially such as was described in the declaration, and such as that the persons sought to be charged might be, in fact and in law, parties to it. But proof of any contract necessarily includes the competency of the parties, and however presumptions, in the absence of proof to the contrary, may aid in making out this element, yet when it expressly appears that one of those jointly charged was legally incompetent, and therefore never a party to the contract, nor anywise

Walker v. Ensign.

bound by it, that fact must defeat the action. It shows not only that there was no joint liability, but that there was no liability at all on the part of one of the defendants, nor any legal possibility of it.

The proof here was made as well by the plaintiff as by the defendants below, and brings the case strictly within the rule declared by this court in *Davison v. Hill*, *Chicago Law Journal*, No. 1, p. 59.

That the Superior Court tried the cause upon views of the law different from those above expressed as ours, is sufficiently indicated by a remark of the Judge upon the effect of the want of a plea of misjoinder, preserved in the bill of exceptions, and by the instructions given, which are assigned for error.

In our opinion, these were erroneous, and therefore the judgment should be reversed and the cause remanded.

Other questions are presented by the record, growing out of alleged irregularities in the conduct of a juror and of the jury, but as they are not likely to recur, we deem it unnecessary to discuss them.

Judgment reversed and the cause remanded.

EDWIN WALKER

v.

WILLIAM A. ENSIGN.

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JUDGMENT BY CONFESSION—AUTHORITY OF COURT TO SET ASIDE.—Courts of law exercise an equitable jurisdiction over judgments entered by confession upon notes and warrants of attorney, and where it clearly appears that the plaintiff was not entitled to a judgment, the court should vacate the same and allow him to pursue the ordinary remedy by action. But where the case is involved in doubt, the defendant should be let in to defend, the judgment in the meantime being allowed to stand as security until the merits of the case have been determined.

ERROR to the Superior Court of Cook county. The Hon. JOSEPH E. GARY, Judge, presiding.

Walker v. Ensign.

Messrs. BAKER & OSGOOD, for plaintiff in error; as to power of the court to set aside or stay the judgment, cited, *Lake v. Cook*, 15 Ill. 353; *Pitts v. Magie*, 24 Ill. 610; *Norton v. Allen*, 69 Ill. 306.

Messrs. SLEEPER & WHITON, for defendant in error; that the facts shown by affidavit constituted a sufficient defense to the notes, *Haywood v. Swords*, 2 Baily Law, 305; *Walker v. Crawford*, 56 Ill. 444; *Bradley v. Bently*, 8 Vt. 345; *Crossman v. Fuller*, 17 Pick. 174; *Mann v. Smyser*, 76 Ill. 365; *Gage v. Lewis*, 68 Ill. 604; 2 Phil. Ev. 567; 2 Starkie Ev. 1002.

BAILEY, J. On the 24th day of August, 1876, William A. Ensign filed in the Superior Court of Cook county, a declaration in assumpsit against Edwin Walker, upon two promissory notes given by said Walker to one J. C. McCord, and assigned by the latter to the plaintiff, both of said notes payable on demand, one being for \$500, dated September 29th, 1875, and the other for \$1,000, dated October 1st, 1875, and both bearing ten per cent. interest from date. Accompanying each of said notes was a warrant of attorney, executed by said Walker, authorizing a confession of judgment against said Walker and in favor of the legal holder of said notes, for the amount due thereon and attorney's fees. With the declaration was also filed a cognovit, confessing judgment on said notes in favor of the plaintiff and against the defendant, for \$1,735.28, being the amount of said notes and \$100 attorneys' fees, whereupon judgment was entered for that amount and costs.

On the first day of September following, being at the same term, the defendant entered his motion to set aside and vacate said judgment, and for leave to plead to the declaration. On the 12th day of September, this motion was heard upon affidavits filed by the respective parties, and denied. To this decision the defendant duly excepted, and he now assigns the same for error.

The affidavits filed upon the hearing of the motion are voluminous, and the transactions out of which this controversy has

Walker v. Ensign.

grown seem to be more than ordinarily complicated. In these affidavits there is a direct, and apparently an irreconcilable conflict on almost every fact upon which the equities of the parties rest, and it is impossible for this Court, in the light of all the proofs presented by the record, to arrive at any satisfactory conclusion as to the real merits of the case.

The affidavits filed by the defendant dispute the entire consideration of the notes, and if the statements of these affidavits are true, the enforcement of the judgment against the defendant would be a gross wrong and fraud upon him. On the other hand, the affidavits filed by the plaintiff, if true, show that the notes were given for a good consideration, and are evidence of a debt justly and honestly owing from the defendant to him.

The case made by defendants' affidavits, is substantially as follows: About the 29th of September, 1875, McCord, the payee in the notes, being about to erect a number of buildings at the corner of Thirty-fourth street and Wabash avenue, Chicago, entered into a contract with the firm of Batchen & Smith, whereby said firm agreed to furnish, cut and set the stone-work in said buildings for \$10,000, of which sum \$5,000 was to be paid in cash, in installments, as the work advanced, and the remaining \$5,000 in notes, due in about three years, and drawing ten per cent. interest. It was further agreed that McCord should loan Batchen & Smith \$2,000 for six months, at ten per cent. interest, McCord taking back and holding as collateral security therefor the notes for \$5,000.

Batchen & Smith thereupon applied to defendant to furnish the stone to be used in said building, which defendant agreed to do on certain terms, provided they would advance him \$1,500 in cash. On the same day, McCord told defendant that he had a plenty of money, and would advance to him for Batchen & Smith, if they should so request, this \$1,500, and Batchen, who was present, at once requested him so to do, whereupon McCord told defendant to come to his office that afternoon for the money.

Defendant accordingly went to McCord's office, when McCord told him he could pay him but \$500 that afternoon, but would pay him the balance the following Monday. McCord

Walker v. Ensign.

then suggested, that as he was paying the money for Batchen & Smith, and as defendant had as yet delivered them none of the stone, they might sustain loss in case of defendant's death, as they had nothing to show for the money. Defendant then told McCord to prepare any paper necessary for their protection, whereupon McCord drew up the \$500 note in question, saying that he would charge the money to Batchen & Smith and hold the note, and upon the fulfillment by the defendant of his agreement with Batchen & Smith he would cancel and destroy it, and thereupon defendant signed the note. On the first day of October following, defendant under the same agreement and understanding received from McCord the remaining \$1,000, and executed said \$1,000 note.

Subsequently defendant performed his contract with Batchen & Smith, and they charged the defendant this \$1,500 and credited the same to McCord as part of the \$5,000 cash payment to be made by him to them.

On the other hand, the plaintiff's affidavits directly dispute those of the defendant, so far as regards the circumstances of the execution of the two notes and the consideration for which the same were given. They further account for the execution of these notes as follows: At the time of the agreement between Batchen & Smith and defendant, it was understood that defendant was to receive from them in payment for the stone to be furnished the notes for \$5,000, which McCord was to deliver Batchen & Smith, and that the \$2,000 to be loaned Batchen & Smith by McCord on the security of said notes, was in fact to be loaned to defendant. In pursuance of this arrangement McCord loaned to defendant the moneys for which these two notes were given as a part of said \$2,000, and retained in his hands the notes for \$5,000 as security for the repayment of such loan. The money so loaned has never been paid to McCord, but is still justly due and owing to him.

The affidavits on both sides detail a great variety of facts and circumstances in corroboration of the account given by them respectively of the transaction, out of which these notes resulted, and after considering them all carefully, our minds are left entirely unsatisfied as to the real merits of the contro-

versy. We think the case one, which, for the attainment of substantial justice between the parties, should be submitted to a jury. Upon a trial the witnesses whose affidavits are presented here may be subjected to cross-examination; their relative credibility may be investigated and passed upon by a jury with the aid of facilities for arriving at the truth which we do not possess.

Courts of law exercise an equitable jurisdiction over judgments entered by confession upon notes and warrants of attorney, and it is necessary to justice that they should liberally exercise that jurisdiction. Where it clearly appears that the plaintiff was not entitled to judgment on the notes and warrants of attorney, the court should vacate the judgment and leave him to pursue the ordinary remedy by action. But where the case is involved in doubt, or the testimony is so contradictory that the truth cannot be ascertained with reasonable certainty, the defendant should be let into a defense on the merits, the judgment in the meantime being allowed to stand as security until the merits of the case are heard and determined—all proceedings upon it however being stayed until the suit is finally determined. *Lake v. Cook*, 15 Ill., 353; *Norton v. Allen*, 69 Id. 306; *Boynton v. Renwick*, 46 Id. 280.

We think the court below erred in refusing to allow the defendant to plead to the declaration and have the merits of the case tried by a jury. The order refusing the motion must be reversed, and the cause will be remanded, with directions to the court to allow the defendant to plead to the merits, and to stay proceedings on the judgment, and permit it to stand as security until the issues which may be tendered by the defendant are determined.

Reversed and remanded.

Fuller v. Heath et al.

HENRY FULLER
V.
MONROE HEATH ET AL.

1. CITIES—CONTRACTING INDEBTEDNESS—CHICAGO CERTIFICATES OF 1877.—The certificates of 1877 were in terms drawn upon and payable out of a special fund, and in no other way; and the parties receiving them, did so, discharging the city from all liability on account of the claim for which they were given, taking alone their chances to collect the same from such special fund. This being the case, it is but giving one thing for another, and is not an increasing of the city indebtedness. The issue of such certificates is not in conflict with the provisions of the Constitution.

2. THE CERTIFICATES OF 1875.—Although the certificates of 1875, were not, by their terms, drawn upon any special fund, they were issued as a means of meeting the current expenses of the city for the year 1875, and were drawn after the appropriation and levy of the tax, out of which it is now proposed to pay them, was actually made; and it would not be inequitable for the city authorities to retire them, giving in substitution therefor, other certificates drawn against the special fund designed for their payment, and to anticipate which they were issued, which would stand on the same footing as the certificates of 1877. The holders of these certificates have an equitable claim to be paid out of the tax levy of that year.

APPEAL from the Superior Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

Mr. EDWARD ROBY, for appellant; insisted that no tax is regarded by Illinois laws as in the treasury till the money gets there. It is a mere debt or chose in action, a right to demand, secured or unsecured, as the statute fixes or does not fix a lien, and cited Rev. Stat. of 1874, 899, §§ 253, 254; p. 896, §§ 229, 230; p. 883, § 155; p. 884, §§ 156, 157, 158, 160, 255, 230, 191, 177; Chicago Comptroller's Report, Jan. 1, 1878, 8, 9, 12, 120; Gross' Stat. 636, §§ 313, 317; Schaeffer v. The People, 60 Ill. 179; Hill v. Figley, 23 Ill. 418; Burrill's Law Dic. "Lien"; Bouvier's Law Dic. "Lien"; Dunlap v. Gallatin Co., 15 Ill. 7; Ryan v. Gallatin Co., 14 Ill. 78; Almy v. Hunt, 48 Ill. 45; Hamilton v. Chicago, 22 Ill. 581; Chicago Com. Coun. Proceedings, 1869, 557.

The law does not require the anticipation of the revenue, but

on the contrary, requires the levy to be made, and the money to be in the treasury substantially, before the expenditure can begin: Constitution, Art. IV, §§ 17, 18; Art. IX, § 12; Rev. Stat. 227; City Incorporation Act, Art. VII, §§ 2, 3; general sections 92, 93, 94, 95, 96, 97, 98, 99, 111, 113; p. 218, § 62; p. 227, §§ 89, 90, 91; p. 229, § 104; p. 878, § 122; p. 960, §§ 43, 44; Com'rs of Highways v. Newell, 80 Ill. 587; Glidden v. Hopkins, 47 Ill. 525; Allerton v. Kimball, 10 Chicago Legal News, 209; Colburn v. Mayor of Chattanooga, 17 Am. L. Reg. 191; Rev. Stat. 880, §§ 138, 154.

Mr. JOSEPH F. BONFIELD, for appellees; that current taxes may be appropriated, in anticipation of their receipt, to the payment of proper and ordinary current expenses, as if at the time they were in the city treasury, and such appropriation is not the creation of a debt; cited Grant v. City of Davenport, 36 Iowa, 396; People v. Pacheld, 27 Cal. 175; Moppekers v. State Cap. Com'rs, 16 Cal. 253; The State v. McAuley, 15 Cal. 455; The State v. Medbury, 7 Ohio, 522; The State v. Mayor, 23 La. An. 358.

The tax appropriated must at the time be actually levied: City of Springfield v. Edwards, 84 Ill. 626; Law v. The People, 8 Law Jour. 339.

The city has authority by virtue of its granted powers and those necessary to carry out the objects of its creation, to issue the warrants set forth in the bill: Rev. Stat. 1874, 228, § 95; Dillon on Mun. Bonds, 9; Com'rs of Highways v. Newell, 80 Ill. 587; Grant v. City of Davenport, 36 Iowa, 396; Mayor v. Ray, 19 Wall, 468.

Such warrants are a legal tender in payment of the taxes of the fiscal year for which they were drawn. Bradwell's Laws 1877, 172.

Each of the warrants so drawn is *pro tanto* an equitable assignment of so much of the fund named therein to the payee, and gives him an equitable and specific lien upon such fund: Phelps v. Northrup, 56 Ill. 156; Kingman v. Perkins, 105 Mass. 111; Moore v. Lowery, 25 Iowa, 336; Morton v. Nailor, 1 Hill, 583; Burn v. Cawvalho, 4 Milne & Craig, 690; Gren-

Fuller v. Heath et al.

fel v. Dean, etc. of Windsor, 2 Bevan's R. 544; Mitchell v. Winslow, 2 Story, 630; 2 Story's Eq. § 1,040.

MURPHY, P. J. On the 17th day of April, 1878, Henry Fuller, the appellant, a resident and tax payer of the city of Chicago, exhibited his bill of complaint in the Superior Court of Cook county, representing that on the 8th day of August, 1870, the date of the adoption of the present Constitution of this State, the bonded debt of the city was over \$13,000,000, far in excess of the constitutional limit of 5 per cent. upon the assessed value of the taxable property of the city, as ascertained by the assessment thereof for State and county purposes; that, notwithstanding that fact, the officers of said city have from time to time received large sums of money in trust for specific purposes, to wit: upon special assessments, City Hall fund and other funds, and perverted the same and paid them out for general city purposes, as they deemed best, to the amount of \$4,000,000 and over, and that, in violation of the plain provisions of the Constitution, they had borrowed in the name of the city a large sum, to wit: the sum of \$5,000,000, which the mayor and comptroller had paid out as they saw fit; that, in the year 1875, the city officers, pretending to be authorized so to do by an ordinance passed April 30, 1875, and by certain statutes of the State, borrowed in addition to the existing debt, a large sum, to wit: \$4,500,000, and issued certificates of indebtedness therefor in denominations to suit lenders, bearing such interest as was agreed upon, in the following form:

"This is to certify that the city of Chicago acknowledges to owe *John Doe* the sum of \$1,000 lawful money of the United States of America, which sum the city promises to pay to said *John Doe* or order, — months after the date hereof (without grace), at the office of the treasurer of the city of Chicago, with interest thereon at the rate of — per cent. per annum from May 1, 1875.

"This loan having been authorized by Sec. 26 of amendments to the City Charter, approved Feb. 15, 1865, and by Sec. 7 of the act of the General Assembly of the State of Illinois, amending the City Charter, approved April 19, 1869.

"In testimony whereof, the mayor and comptroller of the said

Fuller v. Heath et al.

city have signed, and the clerk countersigned, these presents, and caused the seal of said city to be hereunto affixed, this — day of —, A. D. 1875.”

That \$4,000,000 of said sum has since been paid by said officers out of moneys in the treasury of the city, with the interest thereon. That they threaten now and intend to cause the residue thereof to be paid in the like manner.

That in the year 1877, the officers of said city, pretending to be authorized so to do by an ordinance of the City Council of the said city of Chicago, passed April 10, 1877, borrowed a large sum in addition to said existing debt, to wit: over \$3,000,000, and issued certificates therefor in the following form, to wit:

“This is to certify that *John Doe* has advanced to the City of Chicago \$1,000 lawful money of the United States, to meet that part of the current expenses of the year 1877, for which an appropriation has been made for said year for the general appropriation fund, and that said sum will be paid to *John Doe* or order, upon the 21st day of July, 1878 (without grace), at the office of the treasurer of the City of Chicago, with semi-annual interest thereon, at the rate of 6 per cent. per annum from date, out of the taxes levied for said fiscal year, said tax levy having been heretofore actually made.

“The treasurer of the city is hereby ordered to make said payment, as aforesaid, and charge to general appropriation fund. This warrant is issued for an amount not exceeding the appropriation for the above account, and not exceeding the amount of uncollected taxes apportioned to its payment, and which will be held and applied thereto. All of which is sanctioned by the mayor and finance committee, and duly authorized by law and the ordinance of said city.

“In testimony whereof, the mayor and comptroller of said city have signed, and the clerk countersigned, these presents, and caused the seal of said city to be hereunto affixed, the 21st day of July, A. D. 1877.”

Said certificates bear diverse dates, and are made payable at diverse times in 1878.

That large amounts of taxes for the year 1877 and prior

Fuller v. Heath et al.

years are due and unpaid to the city, to-wit: \$5,000,000; that a large sum of money—to-wit: the sum of \$500,000—is in the treasury of the city; that several millions more is about to be collected and paid into the said treasury, and that the mayor and comptroller of said city threaten to cause the certificates of indebtedness and time warrants to be paid therefrom,—prays for an injunction restraining the city authorities from paying any of said pretended debts incurred since Aug. 8, 1870, and that, pending the suit, the mayor and comptroller be restrained from issuing any warrants on the treasurer of the city for the payment of such debts or interest thereon.

To this bill the defendants answer jointly and severally, admitting the issue of the certificates of indebtedness as alleged in the bill, and claiming that they were issued not for the purpose alleged in said bill—that is, to borrow money on the credit of the city for general purposes—but to meet the current expenses of the city government for the years in which they were issued respectively, and that they were issued from time to time in anticipation of the collection of taxes levied for the current expenses of the year in which they were drawn, and were based upon and within the appropriation made for the expenses of the respective years for which they were drawn, and denying that they have ever paid any of said certificates, or threatened or had given out that they intended to pay them except as they paid them out of the taxes levied in pursuance of the appropriation of the City Council for the respective years in which they were issued, and out of the fund or revenue for the anticipation of which they were issued; and disclaim generally and specifically any purpose to pay said certificates except in the manner above stated.

By the agreement of counsel, the case was heard by the court below upon bill and answer, and stipulation that the defendants should have the same benefits as if they had demurred to the portions of the bill not answered; and the prayer of the bill being denied *pro forma* and the bill dismissed, the complainant in the court below brings the record to this court by appeal, and assigns for error the denial of the prayer of, and dismissing the bill, and rendering judgment for costs against complainant.

It will only be necessary to consider the first assignment of error under the view of the case taken by the court.

It is claimed by the appellant that the facts alleged constitute an infraction of Sec. 12, Art. IX. of the Constitution, which is as follows :

“No city shall be allowed to become indebted in any manner, or for any purpose, to an amount including existing indebtedness, in the aggregate exceeding 5 per cent. of the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes previous to incurring such indebtedness. Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall, before or at the time of doing so, provide for the collection of a direct annual tax, sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof, within twenty years from the time of contracting the same.”

It is admitted by the defendants that if these certificates operate to increase the indebtedness of the city, their issue would be in violation of the above section of the Constitution, and therefore void; and, as a consequence, the officers of the city should be prevented from paying them. But it is insisted by the defendants that they are not obligations of the city within the Constitutional prohibition, and therefore do not increase its indebtedness.

The grounds of their position, as we understand them, are that these certificates were issued from time to time by the city authorities for the purpose of defraying the current expenses of the city government for the fiscal year in which they bear date respectively; that in no instance in 1875 or 1877, were such certificates issued until after there was an appropriation by ordinance and levy of the tax to pay the expenses of the city government for the current year, and that the certificates were drawn upon such fund so created by said appropriation and levy, and that in no case did the amount of said certificates so issued equal the amount of said levy. That as to the certificates issued in 1877, they were in terms drawn upon said special fund, and payable out of it, and in no other way, and that

Fuller v. Heath et al.

parties receiving them did so discharging the city from all liability on account of the claim for which they were given, taking alone their chances to collect the same from such special fund. This being the case, it is giving one thing for another, and in no legal sense can be said to be an increase of the city indebtedness.

The case of the city of Springfield v. Edwards, 84 Ill. 626, was a case very similar to this, being a bill filed in chancery by a tax payer to enjoin the city authorities from increasing the indebtedness of the city and levying taxes for its payment in violation of the Constitution. In discussing the lawful power of the city in that case, the court, by Scholfield, J., says:

“If a contract or undertaking contemplates in any contingency a liability to pay when the contingency occurs, the liability is absolute, the debt exists, and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred. And, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else. In this view we are only prepared to yield our assent to the rule recognized by the authorities referred to with this qualification: 1. The tax appropriated must, at the time, be actually levied. 2. By the legal effect of the contract between the corporation and the individual, made at the time of the appropriation and issuing and accepting of a warrant or order on the treasury for its payment, when collected, must operate to prevent any liability to accrue on the contract against the corporation.”

“The principle, as we understand, is, there is in such case no debt, because one thing is simply given and accepted in exchange for another.”

From the doctrine of this case, it is apparent that the issue of the certificates of 1877 were not in violation of the Constitution, because they were drawn upon a particular fund, actually existing to defray the current expenses of the city for that year, and upon the fund created by the tax levied and appropriated for such purpose. This proceeding does not operate to create any liability against the corporation as interpreted by

the Supreme Court, the appropriation and levy having in this case been made before their issue brings them within the rule thus laid down. At the September term of that court for 1877, in the case of *Ida Irena Law v. The People ex rel. Louis C. Huck*, the Supreme Court, in discussing the question of what was an anticipation of revenue already levied, says:

“The manner of anticipating revenue already levied, was before us, and fully considered in the case of *City of Springfield v. Edwards*, 84 Ill. 626, and on the able arguments in this case, we see no reason to change the rule there announced.”

Thus it will be seen that the Court means to adhere to the rule laid down in the Springfield case, as the approved method of anticipating revenue by municipalities.

In the *Commissioners of Highways v. Thomas Newell et al.* 80 Ill. 587, the Court seems to recognize the right of the Commissioners of Highways to anticipate their revenue by the same method as was approved in the case first above cited.

As to those certificates which appear to be issued in 1875, for the purpose of defraying the current expenses of the city, and which do not in terms appear to be drawn upon any special fund, it is insisted by the complainant that, being drawn upon the general fund of the city and in excess of the constitutional limit, they are therefore void. Even though, as a foundation of an action at law against the city, they may be held void, still does it follow that their payment out of the fund mentioned would be inequitable? It appears from the answer that they were issued as a means of meeting the current expenses of the city for the year 1875, and were drawn after the appropriation and levy of the tax out of which it is now proposed to pay them, was actually made. It would not be inequitable, therefore, for the city authorities to retire them, giving in substitution therefor other certificates drawn against the special fund designed for their payment, and to anticipate which they were issued, which would stand on the same footing with the certificates of 1877, which we have shown is a method of anticipating the revenue sanctioned by law. If this may be done, as we think it may, it seems a good test of the equitable claim of the holder of these certificates to be paid out

Walsh et al. v. Truesdell.

of the tax levy of that year, for it will not be claimed that the mere change in the form of the certificates will, in any degree, strengthen their equities. If, then, it be equitable to pay these certificates out of the said tax levy of 1875 when collected, and that is all the defendants claim the right to do, it is not perceived why a court of equity should enjoin the city authorities from so doing.

Having shown that the holders of these certificates have the equitable right to be paid the amount due thereon from the tax levy of that year, if the city authorities choose so to pay them, there is no valid reason why they should be prevented.

The court therefore decided correctly in denying the injunction and dismissing the bill.

Finding no error in the record, the decree of the court below is affirmed.

Decree affirmed.

ELLEN WALSH ET AL.

v.

ANSON M. TRUESDELL.

FORECLOSURE—PARTIES DEFENDANT.—In foreclosure of a trust deed, by bill in chancery, the person named as grantee or trustee in such deed, is a necessary party defendant to such proceedings; and it is erroneous to decree a foreclosure and sale of the premises without joining him as a party defendant.

ERROR to the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

Mr. CHARLES J. BEATTIE, for plaintiff in error; that the allegations and proofs of complainant should agree, cited Kimball v. Took, 64 Ill, 380; Venum v. Venum, 61 Ill. 331; Heath v. Hall, 60 Ill 344; House v. Davis, 60 Ill. 367; Tracy v. Rogers, 69 Ill. 662.

That the trustee should have been made a party: Gardner v.

Walsh et al. v. Truesdell.

Brown, 21 Wall. 36; Moor v. Munn, 69 Ill. 591; Supervisors Douglass Co. v. Wallbridge, 38 Wis. 179; Russell v. Clarke, 7 Cranch. 69; McRea v. Branch Bank of Alabama, 19 How. 376; Sickmon v. Wood, 69 Ill. 329; Jeneson v. Jeneson, 66 Ill. 259; Atkins v. Billings, 72 Ill. 597; Trustees v. Braner, 71 Ill. 546; Alexander v. Hoffman, 70 Ill. 114.

Mr. D. H. HAMMER, for defendant in error; as to allegations and proofs, cited Hahn v. Huber, 83 Ill. 243.

As to parties defendant: Kerr v. Watts, 6 Wheat. 550; Bank of Alexandria v. Seton, 1 Pet. 299; Elmendorf v. Taylor, 10 Wheat. 152.

MURPHY, P. J.—The bill of complaint set out in this record was exhibited on the chancery side of the Circuit Court of Cook county, at the July term, 1875, by Anson M. Truesdell against Ellen Walsh, widow of John Walsh, late of said county, deceased, John Walsh, Michael Walsh, Mary Walsh, Margaret Walsh and William Walsh, his heirs at law, defendants. By the bill it appears that on the sixth day of June, 1871, the said John Walsh, then in his life time, and Ellen Walsh, became and were indebted to one Thomas I. Noble upon a certain promissory note of that date in the sum of \$1400.00, to become due and payable by its terms on the first day of March, 1872, with interest at the rate of ten per cent. per annum. And that for the purpose of securing the payment of said promissory note, according to its tenor and effect, on that day executed and delivered under their hands and seals their certain indenture of trust deed, by which they granted and conveyed to one Joseph N. Barker, of said county, the fee simple title to the following described real estate, to wit: "Lot No. 7, (seven) in Barron's subdivision of lots No. 7 and 8, (seven and eight) of the assessor's division of block number three (3), in Brand's addition to Chicago," which said conveyance was in trust for the purposes in said indenture of trust deed specified; that is to say to secure the payment of said promissory note above mentioned, according to its tenor and effect. It also appears from the record that on or about the

Walsh et al. v. Truesdell.

8th day of October, 1873, said John Walsh departed this life, leaving him surviving the defendants to said bill, as his widow and heirs at law.

The bill prays the aid of the Court in foreclosing said indenture of trust deed as a mortgage, he, said complainant, claiming to be the owner of said promissory note, to secure which the same was given; and that by the decree of the Court, said premises be subjected to sale under the direction of the Court; and that out of the proceeds of such sale said promissory note be paid, etc. It appears that on the 9th day of December, 1876, the Court decreed for the complainant the foreclosure of said trust deed, as prayed, finding due to the complainant from the defendants the sum of \$1,878.20, and for the purpose of paying the same, ordered a sale of said premises by the Master in Chancery, according to the rules and practices of that Court.

From this decree the defendants below prosecute this writ of error, and ask the reversal thereof, and assign several errors, only one of which will it be necessary for us to consider. The 4th assignment is that the Court erred in rendering said decree in the absence of the trustee named in the bill, without his consent, he not being a party.

It is insisted by the plaintiffs in error that the trustee, J. N. Barker, is a necessary party to this proceeding, being, as he is, the grantee named in the trust deed, it is apparent that by such instrument, the title in fee simple of said premises was conveyed to said Barker in trust, to be by him used for the purpose of paying said promissory note, as therein declared, and that said title has ever since and still resides in him. It has long been the settled doctrine of Courts of Chancery in this country, that a party holding the legal title to property involved in a judicial proceeding, is an indispensable party to the record of such proceeding: *Harris et. al. v. Cornell et. al.* 80 Ill. 65.

This bill is filed to subject these premises to sale by a decree of foreclosure of the trust deed to Barker; and by the production of his own principal instrument of evidence, the complainant establishes the important fact that the parties whom

he has made defendants have no other or higher interest in the premises in controversy than a mere equity of redemption.

These premises having been conveyed by John Walsh and Ellen Walsh to the trustee, J. N. Barker, as above stated, and he never having reconveyed or otherwise been divested of such title, it is clear that no proceeding to subject the same to sale can be effective or binding on him unless he be made a party; for it is a familiar and uniform rule that a decree cannot effect the rights and interests of parties who are strangers to the record of such proceeding. Therefore, a sale under any decree to which he was not a party could pass no title to the purchaser.

So it will be seen, that for the complainant to reach the title he seeks, he must bring the trustee, who holds the legal title, before the court, that the sale under the decree may effect a transfer of the title to the purchaser at such sale.

“It is the duty of the complainant to see and know that he has before the court all necessary parties, or his decree will not be binding. It is the policy of the law to prevent a multiplicity of suits, and where a complainant takes a decree without making the necessary parties defendants to his bill, when the necessity of their being made parties is disclosed to him by the answer of those who are made parties and by the evidence in the case, the decree will be reversed.” *Hopkins, et al. v. Roseclare Lead Company*, 72 Ill. 373.

In this case, the necessity of the trustee, Barker, being made a party, appears not only by the answer of those who were made defendants, and the evidence, but by the complainant's own proof. It seems remarkable that he, being within the jurisdiction of the court, and holding at the time the legal title to the premises sought to be reached by the decree, should not have been made a party defendant. But this not having been done, it was error for the court below to decree a sale of said premises, so long as the trustee who really held the fee simple title was not before the court, and for this error the decree of the court below is reversed, and cause remanded.

Decree reversed.

Gault v. Babbitt.

THOMAS H. GAULT
v.
WILLIAM D. BABBITT.

1. LIBEL—OFFICE OF INUENDO.—Appellee posted upon and about the premises occupied by appellant, boards and cards inscribed with the words : “Waiting for Tom Gault’s house-rent for lower story of No. 78 So. Paulina street—several months’ due;” and the declaration charged appellee with meaning thereby to charge the plaintiff with fraudulently withholding such rent. *Held*, that the *inuendo* could not enlarge the real sense of the words, but if, under the circumstances stated, that which was alleged could be reasonably imputed to them, then the allegation of such meaning was strictly its proper function.

2. JUSTIFICATION—WHEN A BAR.—A plea of justification, by its nature is in confession and avoidance, and when properly made is a complete bar. But it is not a complete bar unless it confesses and avoids by justifying the entire charge substantially as made. Anything short of that is necessarily another and different charge.

3. EFFECT OF PLEA OF JUSTIFICATION—PRIMA FACIE CASE—TAKING CASE FROM THE JURY.—A plea in confession and avoidance admits a *prima facie* case for the plaintiff, and no amount of evidence in support of such a plea will justify a court in taking from the jury the consideration of the issue under it. Evidence in support of such a plea, of whatever amount and weight, necessarily raises a question of preponderance, and in no such case can the court direct a non-suit or a finding for either party absolutely.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. JOHN LYLE KING, for appellant; as to the libelous character of the words, cited Rev. Stat. 378, § 177; Townshend on Slander and Libel, 3d ed. 79 note; Id. sec. 133; Spencer v. Southwick, 11 Johns. 5; Boydell v. Jones, 4 M. & W. 446; Sanderson v. Caldwell, 45 N. Y. 98.

That a plea of justification must confess and avoid the charge as alleged, Townshend on Slander and Libel, 3d ed. sec. 214; Mitchell v. Borden, 8 Wend. 470; Clark v. Dibble, 16 Wend. 601; Clark v. Taylor, 2 Bing. (N. C.) 654; Hort v. Reade, 7 Irish Com. Law; Fidler v. Delevan, 20 Wend. 57; Gage v. Robinson, 12 Ohio, 250; O’Connor v. Wallen, 6 Irish Com. Law 378.

Gault v. Babbitt.

Messrs. HUTCHINSON & HINDS, for appellee; contending that the words were not libelous, and their meaning could not be enlarged by innuendos, cited *Brown v. Piner*, 5 Bush (Ky.) 518; *Mix v. Woodard*, 12 Conn. 262; *McKinley v. Robb*, 20 Johns. 350; *Ames v. Hazard*, 8 R. I. 143; *Bloss v. Tobey*, 2 Pick. 320; *Snell v. Snow*, 13 Met. 278; *Hawkinson v. Bilby*, 16 Mees. & W. 442.

That it is the province of the Court to determine whether the publication is libelous, and upon the right of the Court to direct a verdict for the defendant: *Sweeney v. Michis*, 1 Vict. Law Times, 43; *Blagg v. Stuart*, 10 Ad. & E. 899, N. S.; *Gregory v. Atkins*, 42 Vt. 237; *Hunt v. Goodlake*, 43 Law Jour. R. E. C. 54; 29 Law Times N. S. 473; *Haight v. Cornell*, 15 Conn. 74; *Thompson v. Greene*, 5 Ind. 385; *Townshend on Slander and Libel*, 3d ed. 526.

PLEASANTS, J. Appellant filed against appellee his declaration in case for libel, containing several counts, setting forth in substance that he was tenant of appellee of the premises described in the alleged libel; that a dispute arose between them whether any rent was due as claimed; that defendant gave notice of the termination of the lease for non-payment, instituted proceedings in forcible detainer, and obtained judgment therein by default; that plaintiff took an appeal, and executed a bond thereon, conditioned for the payment of whatever rent might be or become due, and otherwise as prescribed by the statute, which was duly approved; and that pending such appeal defendant posted up on a tree in the street, in front of the premises, and upon the premises themselves, at different points, sign-boards and cards on which were conspicuously painted and written the words "Waiting for Tom Gault's house-rent for lower story of No. 78 So. Paulina street—several months' due," meaning thereby to charge the plaintiff with fraudulently withholding such rent.

To this declaration a demurrer was interposed and overruled, and thereupon the defendant filed the general issue, with a stipulation that he might introduce thereunder proof of any matter that he could properly set up under any special plea.

Gault v. Babbitt.

It was proved and admitted on the trial that defendant put up the boards and cards exhibiting the words as alleged; and on the part of the plaintiff evidence was also introduced, tending to show that defendant expressly and repeatedly declared his purpose thereby to expose, shame and disgrace the plaintiff, and so compel him to pay the rent claimed; and that passers by daily observed and remarked upon such signs, and were led thereby to inquire about his character for honesty,—for the purpose of showing express malice on the part of defendant, and that the meaning of the words, as intended by him and understood by others, was that which was imputed by the *inuendo*. The evidence for the defendant tended to prove only the fact that at the time of the publication a balance on account of rent was, and for several months had been due and unpaid, and the ground of the refusal to pay.

On the closing of the testimony, counsel for plaintiff addressed the jury in argument, was followed by counsel for defendant, and was about to reply, when the court interposed, and refusing him permission so to do, and also refusing the entire series of instructions asked by him on behalf of the plaintiff, of his own motion instructed the jury absolutely to find a verdict for the defendant, which they accordingly did.

We are at some loss to determine from the record upon what view of the law this action of the court was taken, but we know of no sound one on which it can be sustained.

If it was that plaintiff's right of action depended upon the establishment of the falsity of the words in their merely literal sense, and that of that there was no evidence whatever, as seems most probable, it was in our judgment erroneous. The libel charged consisted in the meaning which those words really bore in the light of the circumstances, including the manner of their publication. *Spencer v. Southwick*, 11 Johns. 573; *Sanderson v. Caldwell*, 45 N. Y. 398. These were set forth in the declaration, and the meaning was averred to be, not that rent was in fact due and unpaid, merely, but that it was fraudulently withheld. The *inuendo* could not enlarge the real sense of the words, but if under the circumstances stated, that which was alleged could be reasonably imputed to them, then the al-

Gault v. Babbitt.

legation of such meaning was strictly its proper function. The libel alleged was, then, the charge, in manner aforesaid, that plaintiff had been and was willfully and fraudulently withholding rent due.

The evidence for defendant was pertinent only as justification. Justification, by its nature, is in confession and avoidance, but it is a complete bar. How can it be a complete bar, unless it confesses and avoids, by justifying the entire charge substantially as made? In the nature of the case, any charge short of that is necessarily another and different charge. A special plea, purporting to be a bar to the whole cause of action, which confesses and avoids another and different cause of action, must be bad on demurrer. For the same reason, evidence which supports an avoidance of another cause of action, must fall short of a defense to that which is alleged. The stipulation filed in this case was tantamount to a good plea of justification, but evidence thereunder going to justify only a narrower charge than that made by the words complained of, under the circumstances of their publication, would be insufficient.

It was contended by plaintiff that there was no evidence tending to show fraud in his withholding the rent claimed; that is, none apart from the act of withholding, and the ground of it, which might or might not be some evidence thereof, according to the circumstances. But if any, its sufficiency was as clearly a question for the jury as any that can well be imagined. Indeed, as we understand the law, no amount of evidence in support of a plea in confession and avoidance, can justify a court in taking from the jury the finding of the issue under it. The reason is that such a plea admits a *prima facie* case for the plaintiff. Whenever there is any evidence to make a *prima facie* case for him, much more where it is conclusively admitted by the pleading, evidence in support of the plea, of whatever amount and weight, necessarily raises a question of *preponderance*, and in no such case can the court direct a nonsuit or a finding for either party absolutely. These propositions we regard as elementary, and therefore cite no authority for them.

 Bayard et al. v. McGraw et al.

It was for the jury, then, to say under the issue upon the plea of not guilty, what was the real meaning of the words, and under the issue upon the plea of justification, whether by the evidence, the whole charge, in substance, as alleged to have been made, was justified; and the absolute instruction to the jury to find for the defendant, was, therefore, error.

Upon the rendition of the verdict, a motion for a new trial was made by plaintiff and overruled, and judgment thereupon entered on the verdict for the defendant for costs.

The refusal to give the instructions asked by plaintiff is among the errors assigned, but we do not think ourselves called upon now to express any opinion as to the correctness or incorrectness of those instructions, or any of them, because it is evident that the Superior Court refused them for some reason, not involving its judgment upon their correctness. We think it was error to refuse any instruction that was pertinent and proper under the views above expressed, and to refuse permission to plaintiff's counsel to close the argument to the jury by a reply, as well as to instruct absolutely for the defendant. We therefore reverse the judgment and remand the cause.

Judgment reversed and cause remanded.

ELIZABETH McEVERS BAYARD ET AL.

V.

JAMES MCGRAW ET AL.

1. MECHANIC'S LIEN—WAIVER.—Receiving a conveyance of real estate as part payment of a claim for erecting buildings thereon, is not a waiver of a mechanic's lien for the residue, any more than the acceptance of money as part payment would be.

2. DELIVERY IN ESCROW—NOT A WAIVER PRO TANTO.—It is apparent from the testimony in this case, that the deed was never in fact delivered or accepted absolutely. The note, which was the principal, was held in *escrow*, and the deed, which was only the incident, was placed upon record to anticipate the lien of certain judgments against the grantor, upon his promise to remove the incumbrance, such delivery and acceptance is not to be regarded

1	134
55	306
1	134
76	494
1	134
87	669

Bayard et al. v. McGraw et al.

as payment or extinguishment of the lien, *pro tanto*, as between the parties.

3. **TAKING THE NOTE OF THE DEBTOR.**—The taking of the debtor's note is not necessarily, and without regard to the intention of the creditor as to the ultimate effect upon the liability of the debtor, a payment of the debt or waiver of the lien. If such is the intention, or if the actual effect of enforcing the lien after the taking of the note would be to subject the debtor to a double liability, it is a waiver, otherwise not.

4. **NEGOTIATION OF A NOTE SO GIVEN—OFFER TO SURRENDER.**—The note being taken for the accommodation of the debtor, who is in default and unable to pay, and with the understanding that it is to be negotiated; the act of negotiating the same adds no force to the act of taking it, nor would the further act of proceeding to judgment thereon by the holder. But in either case, the lien creditor, before he can have his decree, must be in control of the note or judgment, and offer to surrender or cancel the same.

5. **PAYMENT OF CLAIMS BY MORTGAGER—SUBROGATION.**—The court do not find that the case as made, is such as to entitle appellant's intestate or his representatives to be subrogated to the rights of the creditors, whose liens he discharged, since what he did in that respect was voluntary and not necessary to protect his own interest in the property.

6. **PROCEEDS OF SALE UNDER DECREE—MODE OF APPLICATION.**—The decree ascertained the several amounts by applying a credit of \$1,200 for brick furnished and used in six of the houses, to the whole claim, instead of to those particular houses, and directed a sale of the premises, in separate lots, but that the proceeds should be applied on the aggregate, and not on the amount due upon the lots sold, respectively, thus exposing one lot to sale for what might be due upon another. Such an apportionment of the credit and order of sale is contrary to the statute.

7. **LIEN NOT REGULATED BY THE CONTRACT—CONSTRUCTION OF STATUTE.**—The lien is not given or regulated by the contract, but by the statute, which is in derogation of the common law, and must be strictly construed. The statute gives a lien upon lots and the improvements thereon only for the work done and materials furnished towards the improvement of the lots respectively.

8. **PARTIES—CESTUI QUE TRUST SHOULD BE MADE A PARTY.**—In a proceeding to enforce a mechanic's lien, both the trustee and *cestui que trust* should be made parties, and a failure to commence proceedings against the *cestui que trust* until after the expiration of the time limited by the statute for the commencement of proceedings to enforce a mechanic's lien, will have the effect of postponing the lien of the petitioner to that of the *cestui que trust*. Making the trustee named in the deed of trust a party within the time limited, cannot affect the rights of his *cestui que trust*.

ERROR to the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

Mr. JOHN M. GARTSIDE, for plaintiffs in error; that a party

Bayard et al. v. McGraw et al.

cannot make one case by his pleading, and obtain relief on another made by the proof, cited Tracey et al. v. Rogers, 69 Ill. 662.

As to waiver of lien by taking land: Clark v. Moore, 64 Ill. 273; Brady v. Anderson, 24 Ill. 112; Kinzey v. Thomas, 28 Ill. 502.

By receiving and negotiating the note of the debtor: Clement v. Newton, 78 Ill. 427; Teaz v. Christie, 2 E. D. Smith, 631; Scott v. Ward, 4 Green (Iowa), 112; Hawley v. Ward, 4 Green (Iowa), 39; Green v. Fox, 7 Allen, 88; Grant v. Strong, 18 Wall. 623; Phillips on Mech. Liens, § 281; Scott v. Robinson, 21 Ark. 202; Doub v. Barms, 4 Gill. 1; Gorman v. Sayner, 22 Mo. 137.

That defendants in error have lost their right to a lien by their own laches: Drew v. Kimball, 43 N. H. 282; Bigelow on Estoppel, 453; 3 Washburn on Real Prop. 78; Quirk v. Thomas, 6 Mich. 78; Mitchell v. Reid, 7 Cal. 204.

Upon the question of Bayard's right to be subrogated to the rights of those creditors whose claims he had paid: Jacques et al. v. Falkney et al. 64 Ill. 87; Billings v. Sprague, 49 Ill. 509; City Nat. Bank v. Dudgeon, 65 Ill. 12.

The mode of charging the premises, adopted in the case, is fatal to the decree: Croskey et al. v. N. W. M. Co. 48 Ill. 481; Smith v. Moore, 26 Ill. 393; N. Pres. Ch. v. Jevne et al. 32 Ill. 214; Howett v. Shelby, 54 Ill. 151; Tracey et al. v. Rogers, 69 Ill. 662; Lunt v. Stephens, 75 Ill. 507.

Suit was not commenced against Bayard the *cestui que trust* within the time prescribed by the statute. Where a party is made defendant by amendment subsequent to the filing of the petition, suit is not commenced as against such party until he is so made defendant: Dumphly v. Riddle, 1 Chicago Law J. 230; Miller v. McIntyre, 6 Pet. 61; Crowl v. Neagle, 1 Chicago Law J. 377.

The rights of a person not made a party to a suit, are not affected by any proceedings under it: Broom v. Goolsby, 34 Miss. 437; Gormen v. Judge, etc. 27 Mich. 140; Kelly v. Chapman, 13 Ill. 530; Williams v. Chapman, 17 Ill. 422; Lomax v. Lomax, 45 Ill. 379; Angell on Liens, § 330; Story's Eq. Pl.

A *cestui que trust* is a necessary party to a proceeding to enforce a mechanic's lien: Phillips on Mec. Liens, § 395; Hauser v. Hoffman, 32 Mo. 334; Christien v. Manderson, 2 Penn. 363; Raymond v. Ewing et al. 26 Ill. 329; Williams v. Chapman, 17 Ill. 423; Kimball et al. v. Cook, 1 Gilm. 423; Kelly et al. v. Chapman, 13 Ill. 530; Steigleman v. McBride, 17 Ill. 300; Lomax v. Dore, 45 Ill. 379; Greenleaf v. Beebe, 80 Ill. 520.

The *cestui que trust* cannot be bound by the decree by reason of his trustee being made a party defendant: Hall et al. v. Sullivan Railway, Redfield on Railways, 465; Calvert on Parties, 212; Allen v. Knight, 5 Hare, 272; Kirk v. Clark, Eng. Ch. Pr. 275; Calverly v. Phelp, 6 Madd. 144; Hamm v. Stevens, 1 Vern. 110; Adams v. St. Leger, 1 Ball & B. 184; Douglass v. Horsfall, 2 Sim. & St. 185; Wilson v. City Bank, 3 Sumner, 428; Green v. Sisson, 2 Curtis, 176; Stimpson v. Rogers, 4 Blatch. 337; Com'rs etc. v. Thayer, 4 Otto, 645; Curtis et al. v. Leavitt, 15 N. Y. 194.

Upon the question of *lis pendens*: 3 Sugden on Vendors, 322; Freeman on Judgments, § 195; Anon, 1 Verm. 318; Murray v. Ballou, 1 Johns. Ch. 576; Hayden v. Bachlin, 9 Paige Ch. 513; Hemmington v. Hemergton, 27 Mo. 560; Allen v. Mendiville, 26 Miss. 397; Leich v. Wells, 48 N. Y. 611; Powell v. Wright, 7 Beavan; Grant v. Bennett, 8 Chicago L. N. 379.

Messrs. SCOVILLE & BAYLEY, for defendants in error; that taking and negotiating the note of the debtor is not a waiver of the lien, cited Phillips on Mec. Lien, § 276; Van Court v. Bushnell, 21 Ill. 627; Butts v. Cuthbertson, 6 Geo. 166; Greene v. Ely, 2 Greene (Iowa) 508; Graham v. Colt, 4 B. Mon. 61; Phillips on Mec. Lien, 394; Muir v. Cross, 10 B. Mon. 277; Sweep v. James, 2 R. I. 270; Morton v. Austin, 12 Cush. 389; Edwards v. Derrickson, 4 Dutch. 39.

That receiving and recording the deed did not constitute a waiver of the lien: Bank of Columbia v. Haynes, 1 Pet. 455; Dorr v. Fisher, 1 Cush. 271; Rutter v. Blake, 2 Hare & J. 350; Cross v. Gardner, 1 Show. 68; Chambers v. Griffith, 1 Esp. 150; Judson v. Wass, 11 Johns. 525; Starkie's Ev. 645.

Bayard et al. v. McGraw et al.

PLEASANTS, J. Defendants in error, as partners, filed their petition for a mechanic's lien, setting forth a verbal contract made by them in July, 1875, with Samuel S. Hayes, the owner of the premises, whereby they were to make the necessary excavations, build the foundation and basement walls, lay the brick and set the cut stone in the superstructure, and furnish all the material and do all the work for the lathing and plastering of six dwelling houses in one block on sub-lots described, at prices specified; and also to furnish the material and do the work for the lathing and plastering of two other and separate blocks, of seven and eight houses, respectively, at the same prices fixed for the like in the six first mentioned. Hayes was to furnish the brick to be used in said six, and receive credit therefor at the rate of five and a-half dollars per thousand, and to make payments, on account, from time to time as the work progressed. Upon its completion a settlement was to be had, the total cost ascertained, and the balance found due then paid. It was further agreed that petitioners should receive in payment, to the extent of one-third of such total cost, a conveyance from said Hayes of three lots described, with good title and free from incumbrance, at the agreed price of nine thousand dollars, giving back for the excess their note at three years, with interest at nine *per cent. per annum*, secured by a trust deed of the same premises. The work was to be commenced at once, prosecuted with reasonable diligence, and completed at the latest before the first day of January, 1876. Answers and replications thereto were filed and proofs taken, from which it appears that petitioners promptly entered upon, and energetically proceeded with the work, and that early in October they applied to Hayes for two thousand dollars on account, but not having the money, he gave them his note at sixty days, and afterwards for convenience of negotiation, substituted four of five hundred dollars each, payable to McGraw, which they transferred to creditors of whom they had purchased materials. These he failed to pay, except the sum of one hundred dollars on one; but he took up the other three with renewal notes in the same form, delivered to the holders, which were finally put into judgments against him—one in the name of the holder, and two in that of McGraw.

In November Hayes opened negotiations with Robert Bayard, of New Jersey, for the loan of a large sum of money upon the security of the premises in question, and on the first day of December, in anticipation of its consummation, executed to George W. Smith three trust deeds of the three blocks of houses aforesaid, respectively, to secure the payment of his notes, as many in number as there were lots conveyed, and each lot as security for a specified note—amounting in the aggregate to the sum of \$50,500, payable to his own order at five years, with interest at eight *per centum per annum*, payable semi-annually upon coupons therefor attached. This deed was duly recorded on the third day of December, and with the notes, was afterwards delivered to said Bayard, who thereupon remitted the amount to said Smith to be applied, first, to the extinguishment of existing liens, amounting to some \$40,000, and the residue paid over to Hayes. It was all so applied and paid over by the first day of April, 1876.

Meanwhile, the work contracted to be done by the petitioners was completed on the first day of December, and a few days thereafter a settlement was had, by which the total cost was found to be \$6,000.00. Petitioners then agreed to take \$3,000.00, one half instead of one third as originally agreed, in a credit upon the three lots, and shortly thereafter Hayes and his wife executed their deed of said lots with full covenants of warranty, and they executed their trust deeds of the same premises to David E. K. Stewart, to secure the payment of their note to Hayes for \$6,000.00 at three years, with interest at nine per centum per annum. These papers all bore date of December 1, 1875, but the deed to petitioners was not acknowledged until the 10th, nor recorded until the 18th of January, 1876. The trust deed to Stewart was acknowledged on the day last mentioned, and recorded on the 19th, and the note was left with Runyan in escrow, to be delivered to Hayes upon his removing the liens then incumbering the premises. This he then and repeatedly afterwards promised to do in a few days, but failing to fulfil, the petitioners on the 25th of May, 1876, tendered to him a reconveyance of the property by their deed of special warranty, and thereupon on the next day filed this peti-

Bayard et al. v. McGraw et al.

tion, making parties defendant the said Hayes and his wife, the several tenants of the premises, David E. K. Stewart and George W. Smith, and long afterwards, by amendment, the said Robert Bayard.

On final hearing by the court upon the pleadings and the Master's report of proofs taken, a decree was entered in favor of the petitioners for the full amount claimed, and declaring it the precedent lien. The widow of said Bayard, who is also his executrix and devisee, and George W. Smith, his trustee, bring the record here and assign errors.

And, first, it is insisted that by accepting the deed of the three lots, with full covenants of warranty, petitioners took additional security and thereby waived their lien. But we have seen that by the agreement made before the lien attached, they were to accept it, and that in fact they did accept it, in part payment and not as security, additional or original; and the receiving of part payment in real estate is no more a waiver of the lien for the residue than if it were in money.

Besides, it is manifest from the evidence that the deed was never in fact delivered by Hayes or accepted by the petitioners absolutely. All of the papers of December 1st, relating to these three lots were parts of one entire transaction, and inasmuch as the note, which was the principal, was left in escrow, the delivery of the trust deed to secure it, which was only the incident, was necessarily also conditional. And until the price was absolutely paid or secured, it is to be presumed that the conveyance from Hayes to them was not intended to be absolute. It was put upon record at the suggestion of Hayes, to anticipate the liens of judgments in other suits then pending against him, and upon his promise and doubtless his expectation to remove the incumbrances within a few days. Since he failed to do so, such delivery and acceptance is not to be regarded as payment or extinguishment of the lien *pro tanto* as between the parties; nor as to Bayard, because his loan preceded it and therefore was not in any degree induced by it.

Appellants further claim that the lien was waived or extinguished as to \$2,000.00, by the acceptance and disposition as above stated of the four notes given by Hayes in October. It

is held that the taking of the debtor's note is not necessarily, and without regard to the intention of the parties or the ultimate effect upon the liability of the debtor, a payment of the debt or waiver of the lien: *Van Court v. Bushnell*, 21 Ill. 627. If such is the intention, or if the actual effect of enforcing the lien after the taking of the note would be to subject the debtor to a double liability, it is a waiver, otherwise not. And the same test would seem to be applicable to the negotiation or other disposition of it. Where the money is due, and the note is taken for the accommodation of the debtor who is then in default, and unable to pay, and with the understanding by the parties that it is to be negotiated, we do not see that the act of negotiating adds any force to the act of taking of it; nor would the further proceeding to judgment thereon by the holder. But in either case the lien creditor, before he can have his decree, must be in control of the note or the judgment—whichever is in force—and offer to surrender or cancel it. Here the proof is not entirely clear that petitioners did so control all of the notes or judgments, and less that they offered to surrender or cancel them. The finding of the court differed from the conclusion of the Master in respect to it, although the report of the latter as a whole, was in general terms approved. Forasmuch as the decree is to be reversed on other grounds, and further proof may be taken on this point, we forbear the expression of an opinion as to its effect as it now stands.

For the same reason we deem it unimportant to pass upon another question of fact raised by appellants, viz: whether the evidence shows two or more contracts for the work upon the several blocks, or only one, as alleged in the petition. The objection for variance, if well founded, may be obviated by amendment, or the question more satisfactorily settled by other testimony.

Nor do we find that the case made is such as to entitle Bayard or his representative to be subrogated to the rights of the creditors whose liens he discharged, since what he did in that regard was voluntary, and not under necessity to protect any existing interest of his own in the property.

But we reverse the decree upon two grounds: First, that

Bayard et al. v. McGraw et al.

although it finds particular liens upon the several lots and the buildings thereon, respectively, it ascertains the several amounts by applying the credit of over \$1,200 for brick furnished by Hayes to be used and in fact used in the six buildings, to the whole claim instead of the claim against those buildings only; and it then orders that in default of payment of the whole amount found due, within the short period of one week prescribed, the Master shall advertise and sell the premises—in separate lots, indeed, but to apply on the aggregate and not on the amount due upon the lots sold respectively—thus subjecting or exposing one lot to sale for what may be due on another.

Since there were at least three separate and distinct blocks of buildings, if not twenty-one separate and distinct buildings, this was error.

It is not a sufficient answer to this objection, if it were true, to say that the contract was an entirety, and that the payments were to be made and credited upon it as a whole, because the lien is not given nor regulated by the contract, but by the statute—which is in derogation of the common law and to be strictly construed. That gives a lien upon lots and the improvements thereon only for work done and materials furnished towards the improvement of the lots, respectively. The materials charged against all was in fact so much less for these six buildings alone as was furnished for them by Hayes; and the fact is not changed by calling it, as for convenience in stating the account the parties may have called it, a payment.

Nor is it an answer to say that the order of sale could do no injury in this case because the ownership of all the different lots was the same—that Hayes and Bayard had the whole interest of ownership and incumbrance, subject to the lien of the petitioners, and therefore it could make no difference to them how the credit was distributed, or for what portions of the whole lien any particular lot should be sold. We cannot know that; and it is enough that the apportionment of this credit and the order of sale were contrary to the statute, as construed by the Supreme Court: *Steigleman v. McBride*, 17 Ill. 300; *James v. Hambleton*, 42 Id. 308; *Culver v. Elwell*, 73 Id. 536.

Second: The more serious error of the decree is that it gives precedence to the lien of the petitioners, which we think was postponed to that of Bayard by their neglect to make him a party to the proceeding for its enforcement within the six months limited by the 28th Section of the Statute. R. S. 1874, p. 668.

The contract was fully performed on their part, and by its terms their claim became wholly due and payable, on the first day of December, 1875—the trust deeds to Smith were recorded on the third—and the petition was filed against all the other defendants, including Smith, on the 25th day of May, 1876. But Bayard was not made a party until July 9, 1877.

Appellees claim that he was fully represented by Smith, his trustee, and bound by the decree against him.

The deeds showed that Smith had but the naked legal title, with no beneficial interest in the property or in the debt secured by it, and was without power to act in the premises except upon a contingency which at the time of filing this petition had not happened, *to wit*: the default of Hayes; and then, merely to sell and pay over the proceeds to his *cestui que trust*, the party really interested. Such a trustee is certainly not the “creditor” intended by the section of the statute above referred to. And it seems to be settled that he is not his representative in such a sense as that a decree against him, affecting the property, will bind the *cestui que trust*.

Thus in *Lomax et al. v. Dore et al.* 45 Ill. 379, one Brown had purchased the premises in question of Lomax, and given a trust deed to Marye to secure the purchase money. He afterwards contracted with the defendants in error to improve them. In default of payment the trustee sold under the power contained in his deed, and Lomax became the purchaser, and went into possession. Defendants in error filed their petition against Brown for a mechanic’s lien, obtained a decree, and purchased the premises at the sale thereunder. They then brought this bill to determine their rights, and on demurrer to it the Supreme Court held, that to the proceeding to enforce the mechanic’s lien, both the trustee and the *cestui que trust* should have been made parties, and that the demurrer reached this objection.

Bayard et al. v. McGraw et al.

Again, in Scanlan et al. v. Cobb, guardian, &c. 9 Legal News, 340, Cobb's ward had conveyed to Scanlan, who borrowed \$4,000 of one Goodman upon the security of the property, and to secure its payment conveyed to Lyman, in trust, to sell on default, &c. Cobb brought this bill to set aside his ward's deed on the ground of her insanity at the time of its execution, against Scanlon her grantee, and Lyman the trustee, but did not make Goodman a party. The Supreme Court say that "Lyman had but the naked legal title, with the duty to sell on default of payment of the amount secured by his deed when due, but the substantial equitable interest was in Goodman," and citing with approval Story's Eq. Pl. § 207, for the rule as to parties in such cases, hold that "Goodman was clearly a necessary party, and it was error to deprive him of his security without giving him an opportunity to be heard." See, also, Story's Eq. Pl. §§ 201, 207; and 1 Daniel's Ch. Pl. & Pr. (4th Ed. by Perkins,) 256; and the opinion of Mr. Justice CURTIS, in Hall v. Sullivan Railway, in 2 Redfield on the Law of Railway's, pp. 465-471 (note).

The only case cited by counsel for appellees on this point, is that of Willis v. Henderson, 4 Scam. 13. That was a bill to foreclose a mortgage. The mortgagor subsequently conveyed his equity of redemption to a third party, with notice of the mortgage; and he afterwards voluntarily to a fourth, in trust for the benefit of his creditors generally. It was sought to reverse the decree of foreclosure, because these creditors were not made parties, but the Supreme Court held it unnecessary. There the trust was clearly an active one. And further, we have never supposed that a decree of foreclosure was erroneous because subsequent purchasers or incumbrancers were not made parties to the bill, but that in such case their rights were simply unaffected by it and they might still redeem.

It was also urged that Bayard was not named in the deeds to Smith as *cestui que trust*; that the record disclosed no interest in him, and that petitioners were not bound to discover and proceed against the holder of a secret lien. But the lien was not a secret one. It was evidenced by deeds duly recorded before petitioners settled with Hayes,

Pfmann et al. v. Henkel et al.

which, therefore, were constructive notice; and actual notice is also shown by the fact that they made the trustee a party in the first instance. The *cestui que trust* was declared to be the holder of the notes described in the deed, whoever he might be. If he had been named he might at any time have transferred them to another; and so of every case in which the interest depends upon the ownership of a negotiable note. But this will not excuse the neglect to use some effort to ascertain the party and bring him before the court. Here the amount of the loan and the tenor of the notes indicated that the holder held them as an investment. His name could easily have been ascertained by inquiry of Smith or Hayes, and following it up if found necessary. And we know of no reason why petitioners might not have availed themselves of the provisions of the Chancery Act, in reference to unknown parties. The 9th Section of the Lien Act makes those provisions applicable to proceedings under it.

We hold, then, that they could not acquire priority over his lien without making him a party, known or unknown, within six months from the time when their claims became due and payable, and having failed to do so, his representative may claim the benefit of the bar: *Dumphy v. Riddle*, Chicago Legal Jour. Vol. 1, No. 5, p. 230; *Crowl v. Neagle*, Id. No. 9, p. 377.

For the errors above indicated, the decree of the Circuit Court is reversed and the cause remanded.

Judgment reversed.

ANDREW PFIRMANN ET AL.

v.

FREDERICK HENKEL ET AL.

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106	'98

1. LIMITED PARTNERSHIP—FORMATION—STATUTORY REQUIREMENTS.
—In order to the formation of a limited or special partnership, the provisions of the statute must be at least substantially complied with. The provisions of the statute in this state in relation to the formation of limited

Pfirrmann et al. v. Henkel et al.

partnerships, contemplate not only that the certificate and affidavit mentioned shall be *filed and recorded* in the office of the county clerk, *but that they shall remain on file in his office*; these requirements are of the very substance of the statute; and merely depositing them in the office of the county clerk for the purpose of filing and recording, and afterwards withdrawing them, would not be a substantial compliance therewith.

2. SPECIAL PARTNER—LIMITING LIABILITY.—A special partner, before he can claim the protection of the statute as to the limit of his liability, must see that all its requirements are complied with, and if he fails so to do, the limitation upon his liability is destroyed, whether that failure is intentional or arises through mistake or inadvertance.

3. In this case the certificate and affidavit were sent by a messenger to the county clerk's office, and presented for record, but the deputy clerk instead added a certificate of the official character of the notary before whom they were acknowledged, and they were brought away by the messenger, and several months afterwards returned to the county clerk's office, and filed and recorded. As against a creditor whose debt accrued before the papers were returned to the clerk's office, *held*, not a substantial compliance with the statute.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Messrs. TENNEYS, FLOWER & ABERCROMBIE, for appellants; as to the effect of not complying with the statutory requirements, cited Haggerty et al. v. Foster et al. 103 Mass. 17; Beers v. Reynolds et al. 12 Barb. 288; Same v. Same, 1 Kernan, 97; Haviland et al. v. Chace et al. 39 Kernan, 283; Van Ingen v. Whitman, 12 N. Y. 513; Andrews v. Schott, 10 Pa. St. 47; In re Merrill, 13 Banking Reg. 91; In re Terry, 5 Bissell, 110.

As to filing and recording, Hamilton v. Beardslee, 51 Ill. 478; Hodgen v. Guttery, 58 Ill. 431; Peck v. Cosgrove, 4 Bissell, 437; Hickman v. Perrein, 6 Colwell (Tenn.) 135.

Messrs. MONROE, BISBEE & BALL, for appellees; contended that there had been a substantial compliance with the statute, and cited Madison Co. Bank v. Gould, 5 Hill, 309; Bowen v. Argall, 24 Wend. 496; Smith v. Argall, 6 Hill, 479.

As to filing and recording, Merrick v. Wallace, 19 Ill. 486; 3 Wash. on Real Property, 385; Riggs v. Boylan, 4 Bissell, 445.

Pfirmann et al. v. Henkel et al.

BAILEY, J. This suit was brought by appellants against Emanuel Hartman, Simon Hartman and Frederick Henkel, as co-partners, doing business under the name and style of Hartman Brothers, as acceptors, in their firm name, of a bill of exchange for \$390.55, drawn upon them by appellants, dated August 23d, 1877, and payable four months after date. The two Hartmans having before the commencement of the suit been adjudicated bankrupts, no service of process was had on them. Henkel alone appeared and plead *non assumpsit*, and also a plea verified by his affidavit, averring that at the time of the acceptance of said bill of exchange, he was only a special partner in said firm.

Upon a trial by a jury the issues were found for the defendant, and the court below after overruling a motion by appellants for a new trial, rendered judgment against them on the verdict for costs.

The main question presented here is, whether the evidence in the record sustains the defense set up in appellee's second plea.

It appears from the evidence that on the first day of March, 1877, the members of said firm made, signed and acknowledged an instrument in writing, whereby they certified that Emanuel Hartman, Simon Hartman and Frederick Henkel, of the city of Chicago, had formed a limited co-partnership for the purpose of carrying on the rectifying and wholesale liquor business in the city of Chicago, under the style and firm of Hartman Brothers; that said Emanuel Hartman and Simon Hartman were the general partners, and the said Frederick Henkel the special partner; that said special partner had contributed \$15,000 in cash toward the capital of said co-partnership, and that said co-partnership was to commence March 1st, 1877, and continue until January 1st, 1879. Accompanying said certificate was an affidavit of Emanuel Hartman, one of the general partners, that said special partner had actually and in good faith paid in, in cash, the sum of \$15,000 toward the capital stock of said co-partnership, as set forth in said certificate.

It was admitted by appellants that all the steps necessary to the formation of a limited partnership under the statute were

Pfirmann et al. v. Henkel et al.

properly taken, except the filing and recording of the foregoing papers.

The testimony as to the filing and recording of these papers is substantially as follows:

On the 3d day of March, 1877, Emanuel Hartman handed said papers and one dollar in money to one Henry Hoyer, who at the time was employed by the firm to drive their team, work in the store, and do errands for them, with instructions to take said papers to the office of the county clerk and have them filed and recorded, and pay the fee for recording. The messenger being unacquainted with the manner of doing business in the county clerk's office, never having been there before, went to the first "window" in the office, and told the person standing there that he wanted the paper recorded, and was told to go to the next "window." He went as directed, and handed the papers to the person inside, and told him he wanted them recorded. The deputy clerk to whom the papers were thus delivered happened to be the one having charge of the issuing of marriage licenses and certificates of magistracy, and understanding, as it seems, that a certificate of the official character of the notary before whom the affidavit was taken was desired, made out such certificate, attached it to the affidavit, and handed the papers back to the messenger, who had remained waiting for them, taking twenty-five cents only as fees therefor, and returning the messenger seventy-five cents change. The messenger took the papers back to the store, and handed them, together with said change, to one of the Hartmans, who opened the papers, looked at them, saw the county clerk's signature, and then put them in his safe, where they remained until the 30th day of October following, when he took them back to the clerk's office, and had them filed and recorded.

When the papers were in the clerk's office in March, they were not recorded nor marked filed, but when taken back by Hartman, in October, he prevailed on the clerk to mark them as filed March 3d; but afterwards, on remonstrance of certain parties, the clerk crased that date, and marked them as filed October 30th.

Apart from the provisions of our statute, the rule of law is

fundamental, that he who enters into a contract by which he is to contribute capital, and share in the profits of a firm, shall be liable *in solido* for its debts. The intent of the statute is to relax this rule only on certain conditions, and within certain fixed and prescribed limitations. If these are not fulfilled or are disregarded, the statute furnishes no protection or shield against the ordinary common law liabilities of a general partner.

The authorities are uniform, that in order to the formation of a limited or special partnership, the provisions of the statute must be at least substantially complied with : Pars. on Part. 532; Richardson v. Hogg, 38 Penn. St. 153; Andrews v. Schott, 10 Id. 47; Vandike v. Roskam, 67 Id. 330; Smith v. Argall, 6 Hill, 479; Brown v. Argall, 24 Wend. 496; Pierce v. Bryant, 5 Allen, 91; Haviland v. Chase, 39 Barb. 283; Van Ingen v. Whitman, 62 N. Y. 513.

By section 4 of the statute in relation to limited partnerships, it is provided that persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain the name or firm under which the partnership is to be conducted, the general nature of the business to be transacted, the names of the general and special partners therein, distinguishing which are general and which are special partners, and their respective places of residence; the amount of capital stock which each special partner shall have contributed to the common stock, and the period at which the partnership is to commence, and the period when it will terminate, which certificate must be duly acknowledged by the several persons signing the same.

Section 6 provides that "the certificate so acknowledged and certified shall be *filed* in the office of the clerk of the county in which the principal place of business shall be situated, and shall be *recorded at large* by the clerk in a book to be kept by him; and such book shall be subject at all reasonable hours to the inspection of all persons who may desire to inspect the same. If the partnership shall have places of business situated in different counties, *a transcript of such certificate*, and of the acknowledgment thereof, duly certified by the clerk in whose office it shall have been filed, under his official

Pfirrmann et al. v. Henkel et al.

seal, shall be filed and recorded in like manner in the office of the clerk of every such county," etc.

Section 7 provides that "at the time of filing the original certificate, as before directed, an affidavit of one or more of the general partners shall also be *filed* in the same office, stating that the amount in money or other property, at cash value, specified in the certificate to have been contributed by each of the special partners to the common stock, has been actually and in good faith contributed and applied to the same."

The object of the statute in thus requiring these papers to be filed in the office of the county clerk, and the certificate and acknowledgment to be recorded at large, is to thereby place among the files and records of a public office, subject at all times to the inspection of all persons interested, exact and authentic information of the precise limitations which the special partner seeks to place upon his partnership liability. These requirements are of the very substance of the statute, and the special partner must see to it that they are complied with. If he fails so to do, it can make no difference whether such failure is intentional, or results from mistake or inadvertence, as in either case the limitation upon his liability is destroyed.

We think in this case it was plainly the duty of appellee, not only to deliver the certificate and affidavit to the county clerk, but to leave them among the files of the clerk's office. No beneficial purpose could be subserved by merely delivering them to the clerk, even if the clerk had marked them filed, and then taking them away and keeping them in the custody of the firm. Even if it should be admitted that a delivery of the papers to the clerk, with a request that they be filed and recorded was *ipso facto* in contemplation of law, a filing and recording of the papers, so far as appellee was concerned, such admission must be subject to the qualification, that the papers should not be taken away by appellee from the place where by law they were required to remain. It is doubtless true, that after appellee had performed all the law required of him, he should not be prejudiced by the failure of a public officer to perform his official duty, provided no act of appellee's inter-

vened causing or contributing to such failure. If the position can be maintained that the law was complied with, and the formation of the special partnership consummated, the instant these papers were placed in the custody of the Clerk, with a request that they be filed and recorded, and that too wholly irrespective of what subsequently became of, or was done with them, the door is open for a complete evasion of every beneficial object sought to be attained by the statutory requirements.

But it is insisted that the papers were taken away from the clerk's office by the messenger through mere inadvertence and mistake, and that such mistake and inadvertence should not be held to defeat the rights acquired by appellee upon the delivery of said papers to the clerk. It should be observed that appellee is chargeable with the acts of his messenger precisely as though he had performed them himself. We can see no reason why these acts, though done inadvertently, should not have the same effect upon appellee's rights as though done intentionally. The rights of third parties, for whose protection the statute was enacted, were just as effectually prejudiced in one case as in the other.

A somewhat analogous principle was decided in the case of *Van Ingen v. Whitman*, 62 N. Y. 513. In that case, it was shown that the affidavit that the contribution of the special partner had been actually paid in, in cash, was false, and it was held that it was not necessary, in order to defeat the special partnership, that the statement should be *intentionally* false. The court say: "The affidavit is called for that the public may have reliance upon the existence of the fact of payment. The statute is thwarted, the public is misled, and its reliance is misplaced and deceived, as much when there is an unintentional untruth as where there is an intentional one. This statute does not set out to deal with motives, but with acts and their results, and it guards the public, not by requiring good intentions, but a certain act done in a certain mode, and a true statement that it has been done thus."

So in this case the statute required the certificate and affidavit to be placed on file, and left there for the information and protection of the public; and if they were taken from the files

Pfirman et al. v. Henkel et al.

through the agency of appellee, it is immaterial whether they were taken away designedly or through a mistaken view of the requirements of the statute, or through sheer thoughtlessness, as in either case the public were to the same extent deprived of the information and protection which the law designed to give.

It is however insisted on behalf of appellee, that the statute does not intend that the certificate and affidavit shall remain among the files in the Clerk's office, but that it only requires them to be "filed for record," and that upon being recorded they may properly be taken away. To this view we are not prepared to yield our assent.

Filing a paper, *ex vi termini*, means placing and leaving it among the files. The memorandum indorsed by the officer in whose custody it is placed, is merely evidence of the filing and not the filing itself. Where a paper is required to be filed only for a specified purpose, or to remain on file for only a limited time, the special or limited character of such filing is usually indicated by the statute.

Thus, in § 31, Ch. 30 of the R. S., entitled Conveyances, deeds and other instruments relating to lands are spoken of as being "filed for record." There the filing is for the mere purpose of being recorded, and when that is accomplished the instrument may properly be withdrawn from the files. We think no such limitation upon the character of the filing is indicated by the language of the statute in relation to limited partnerships.

Moreover, it appears that while the statute requires the certificate and acknowledgment to be recorded, it does not contemplate recording the affidavit. That is merely required to be placed on file, and it manifestly must remain there as the only means of furnishing the public information of its contents. Again, where the firm has places of business in different counties, a certified transcript of the certificate and acknowledgment—not a certified copy of the record of such papers—must be filed in each county. This can only be complied with in case the certificate and acknowledgment themselves are left on file.

FOX v. TURNER.

In this case, from the formation of the partnership on the first day of March, up to the thirtieth day of the October following, there was no evidence in the county clerk's office of any claim on the part of appellee of any limitation upon his partnership liability, except the few moments the papers were there on the third day of March. For the fact that there was no such evidence there, appellee is responsible, and must suffer the consequences resulting therefrom. He failed to comply with the statute in one of its most material requirements, and so must fail of the protection which he seeks from its provisions.

On the trial below, the court took a different view of the law from that which we feel compelled to adopt as the correct one, and instructed the jury accordingly. We do not deem it necessary to review the instructions, as our view of the law is already sufficiently indicated. We think the evidence fails to sustain the defense interposed on the trial, and that the court erred in his instructions to the jury, and in denying appellant's motion for a new trial, for which errors the judgment is reversed and the cause remanded.

Reversed and remanded.

MARY E. FOX

v.

HERNY L. TURNER.

1. CONTRACT—OFFER—ACCEPTANCE.—An acceptance, to be good, must in every respect meet and correspond with the offer made, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.

2. REJECTION OF OFFER—PROPOSAL OF DIFFERENT TERMS.—A proposal to accept an offer, on terms varying from those proposed, amounts to a rejection of the offer and a substitution in its place of a counter proposition, which cannot become a contract until assented to by the first proposer. The original offer thereby loses its vitality, and is no longer pending between the parties, and it becomes an open proposition again only when renewed by the party who first made it; hence, the party who submitted the counter proposition cannot, without consent of the other, withdraw or abandon the

1	153
48	603
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Fox v. Turner.

same and then accept the original offer, which he has once virtually rejected.

3. TIME OF ACCEPTANCE.—The acceptance of a proposition communicated by letter, is complete on the delivery of such acceptance to a messenger, to be carried to the proposer, and the contract is binding from that point of time, and not from the time of its delivery to the proposer; so that if B gives to a messenger for the purpose of delivering to A an acceptance of a proposition made by A, simultaneously with the time that A dispatches a messenger to notify B that the proposition is withdrawn, the acceptance is complete and the contract binding.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Messrs. TULEY, STILES and LEWIS, for appellant; contended that there was no acceptance, and cited Chitty on Con. 11; Metcalf on Con. 18; 1 Hilliard on Con. 28; 1 Story on Con. 502; 1 Parsons on Con. 476; Potts v. Whitehead, 23 N. J. Eq. 512; Myers v. Smith, 48 Barb. 614; Fenno v. Weston, 31 Vt. 345; Hutchinson v. Barker, 5 Mees. & W. 535; Jordan v. Norton, 3 Beavan, 336; Cornwells v. Krengel, 41 Ill. 394; Beckwith v. Cheever, 21 N. H. 41; Eliason v. Wheaton, 4 Wheat. 225; Carr v. Duval, 14 Pet. 77; R. R. Co. v. Jackson, 24 Conn. 514; Baker v. Johnson County, 37 Ia. 186; Jenness v. Mount Hope Iron Co. 53 Me. 20; Benjamin on Sales, 40; Sheffield Canal Co. v. R'y Co. 3 Railway & Canal Cas. 121; Hyde v. French, 3 Beavan, 334; B. & M. L. R'y Co. v. Town of Unity, 62 Me. 148; Tinn v. Hoffman & Co. 29 Law Times, 273; Felt-house v. Bindlay, 11 C. B. (N. S.) 869.

Messrs. BARNUM and VAN SCHAACK, for appellee; upon the question of acceptance and when it took effect, cited 1 Parsons on Con. 483; Hutchison v. Blakeman, 3 Met. 80; Mactier v. Frith, 6 Wend. 103; 2 Dutcher (N. J.) 282.

BAILEY, J. This was an action of assumpsit, brought by appellant against appellee in the County Court of Cook county. The declaration avers the execution by one Charles M. Jaques to appellee, of a lease of certain premises in Chicago, from the 20th day of September, 1875, to the 30th day of April, 1879, at

Fox v. Turner.

\$60 per month, payable monthly in advance; the grant of the reversion and assignment of the lease by said Jaques to appellant; the attornment by appellee to appellant, and default in the payment of rent for the months of October, November and December, 1877.

Appellee plead non assumpsit, and upon trial by the court, without a jury, the issue was found, and judgment rendered for appellee.

The evidence upon the trial showed that, after the purchase of the demised premises by appellant, by agreement between her and appellee, the rent was reduced from \$60 to \$50 per month.

The defense made upon the trial was, that prior to the accruing of the rent sued for, an agreement was entered into between appellant and appellee, whereby the lease was canceled. The evidence by which appellee sought to establish such contract consists of certain correspondence between the parties. On the 24th of August, 1877, appellee having determined to move out of the demised premises, sent to appellant's attorneys, by mail, the following letter:

“CHICAGO, August 24, 1877.

“MESSRS. TULEY, STILES & LEWIS, CHICAGO:

“*Gentlemen:*—I have very nearly completed my moving, and shall leave the house (Mrs. Fox's, 471 W. Jackson) tomorrow. There are some articles of value which I am willing to leave if the lease is canceled. There are some two or three tons of coal, carpets in good order on two bedrooms and in the dining room, oil-cloth on the kitchen and bath-room, window shades in nearly all the windows, and screens in almost every window.

“Yours very truly,

“H. L. TURNER.”

This letter was forwarded by said attorneys to appellant with the following written thereunder:

“If you want to do anything about this you can let us know.
Yours, etc.,

“TULEY, STILES & LEWIS.”

Fox v. Turner.

On the 28th of August appellee received from said attorneys the following reply:

“CHICAGO, Aug. 27th, 1877.

“HENRY L. TURNER, ESQ.,

“*Dear Sir:*—Your note in regard to giving up house to Mrs. Fox we forwarded to her. She has been in, and will cancel the lease, provided you leave the things you mentioned, and pay the rent for September. Yours, etc.,

“TULEY, STILES & LEWIS.”

August 29th appellee wrote as follows:

“CHICAGO, August 29, 1877.

“MESSRS. TULEY, STILES & LEWIS, CHICAGO :

“*Gentlemen:*—Your note of the 27th is received. I am having the calciminers touch up the walls in one or two places where they have been marred a little since spring. If Mrs. Fox will allow this bill towards the rent for September, and will take a single bed, mattress and bureau, and a load of kindling, which are in the house, as \$15.00 towards the amount of rent, I will try to raise the balance to-day. The calciminers' bill will not be over \$5.00. The articles mentioned in my letter of August 24th, I would leave, of course.

“Yours very truly,

H. L. TURNER.”

This letter was forwarded to appellant by one of her attorneys, with the following note:

“You see by the above that Mr. Turner will pay, you \$35, and turn over the above property in addition to what he mentioned before, if you will release him and pay the calcimining bill of \$5. Let me know what you want to do.

“Yours, etc.,

JNO. LEWIS.”

On the morning of September 1st appellee sent to said attorneys, by messenger, the following letter:

“CHICAGO, September 1, 1877.

“MESSRS. TULEY, STILES & LEWIS, CHICAGO :

“*Dear Sirs:*—Have you received word from Mrs. Fox in reference to taking the articles named in my last to apply on the rent for September? Yours very truly,

“H. L. TURNER.”

Fox v. Turner.

This letter was returned to appellee by the same messenger, with the following answer underwritten:

"I have not. I enclosed your note to her, and asked her to let me know what she would do. Will let you know when I hear from her.

"JNO. LEWIS."

Appellee then caused all his goods to be removed from the house, except those mentioned in his letter of August 24th, and at about 2 o'clock P. M. sent a messenger to the office of said attorneys with a certified check for \$50, and his lease of the premises and the keys of the house, with instructions to notify them that he accepted the offer of appellant contained in the letter of August 27th, and to deliver the check and keys and to ask a cancellation of the lease. The messenger returned at about a quarter to 4 o'clock, and reported that he found the office of said attorneys locked. Appellee then sent the same messenger to the residence of appellant, with the same instructions, and the following letter to be delivered to her:

"CHICAGO, Sept. 1, 1877.

"MRS. MARY E. FOX, CHICAGO:

"*Dear Madam:*—I have decided to accept your offer for cancellation of lease on payment of rent for September, and delivery of articles mentioned in my note of August 24th to your attorneys, Messrs. Tuley, Stiles and Lewis. I sent around to their office, but none of them were in, and as I do not wish to be responsible for the house over Sunday, I send direct to you. Enclosed you will find my certified check for \$50, and the bearer will give you the key to the house. Please write across the face of the lease canceled, and sign your name. You will find everything right in the house, except one pane of glass in the basement, where the house was entered this morning. The thieves were scared away before any harm was done, however.

"Yours very truly,

"H. L. TURNER."

About 5 o'clock the same afternoon, appellee received by mail, from appellant's attorneys, the following letter, the same having been written and mailed that day, viz:

Fox v. Turner.

"CHICAGO, Sept. 1, 1877.

"MR. TURNER:

"*Dear Sir:*—Mrs. Fox has concluded to revoke her offer to cancel the lease of 471 W. Jackson street, and to hold you for the rent until the end of the term. The rent for September is due to-day. Will you please send us a check for it?

"Yours,

"T. STILES & LEWIS."

The evidence leaves it uncertain whether this letter revoking the offer, came to appellee's hands before or after the arrival of his messenger at appellant's house. Both occurrences are placed at about 5 o'clock, and may have been simultaneous, or either may have been prior in time, so far as the evidence shows.

We think it however to be wholly immaterial which of these events transpired first, since it appears beyond question that appellee's messenger *was dispatched* with his acceptance, before the letter of revocation was received. If the offer contained in the letter of August 27th was open for appellee's acceptance on the first day of September, the *aggregatio mentium* must date from the time his messenger was sent, and not from the time of the delivery of the notice of acceptance. Any overt act amounting to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, completes the contract. The case is not changed by the fact that the messenger by whom the acceptance was transmitted, was the party's own agent. The real question is whether the intention to accept was manifested by any overt act, not by what kind of messenger it was sent. *Hallock v. Commercial Ins. Co.* 2 Dutch. 268; *Mactier v. Frith*, 6 Wend. 103.

The vital question in this case, however, is, whether the proposition contained in the letter of August 27th was open at the time appellee undertook to accept it. The solution of this question will depend upon the legal effect to be given to appellee's letter of August 29th.

Appellee, upon receiving from appellant an offer to cancel

Fox v. Turner.

the lease upon certain specified terms, was at liberty to accept or reject it, but he was bound to do one or the other. If he chose to accept it, he could only do so precisely according to its terms. Anything short of this was a virtual rejection.

An acceptance, to be good, must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing them just as they stand. *Potts v. Whitehead*, 23 New Jersey Eq. 512. But a proposal to accept, or an acceptance of an offer, on terms varying from those proposed, amounts to a rejection of the offer and a substitution in its place of a counter proposition, which cannot become a contract until assented to by the first proposer. It is equivalent to saying "I am not satisfied with your proposition, but I will take it and make certain modifications in it, and submit it to you, as a proposition of my own for your acceptance." The original offer thereby loses its vitality, being, so to speak, passed by in the course of the negotiation, so as to be no longer pending between the parties, and it becomes an open proposition again, only when renewed by the party who first made it. Hence, a party who has submitted a counter proposition cannot, without the assent of the other party, withdraw or abandon the same, and then accept the original offer which he has once virtually rejected. 1 Pars. on Contr. 477; *Baker v. Johnson*, 37 Iowa, 186; *Eliason v. Wheaton*, 4 Wheat. 225; *Carr v. Duval*, 14 Pet. 77; *Jenness v. Mount Hope Iron Co.* 53 Me. 20; *B. & M. L. R'y Co. v. Town of Unity*, 62 Id. 148; *Sheffield Canal Co. v. Railway Co.* 3 Railway & Canal Cas. 121; *Tinn v. Hoffman*, 29 Law Times' Rep. 273.

Appellee, by his letter of August 29th, proposed to accept appellant's offer, with certain modifications. He thus submitted to appellant a counter proposition which she could accept or reject, but by the same act he precluded himself from the right to go back and peremptorily accept the appellant's offer, and thus bind her without any further assent on her part. Before she could be bound, it was necessary that she should again manifest her assent to her original proposition, or do some act which would be tantamount to renewing it.

Breaton v. Johnson.

There being no evidence in the record of the renewal by appellant of the offer contained in her letter of August 27th, after its virtual rejection by appellee, by his letter of August 29th, the evidence fails to establish any contract between the parties canceling the lease. The lease then being in force, the court below should have rendered judgment in favor of appellant against appellee for \$150, the rent due at the commencement of the suit, and costs.

But it is insisted by counsel for appellee, that the letter of appellant's attorneys of September 1st, in which they say: "Mrs. Fox has concluded to revoke her offer to cancel the lease," etc., shows that up to that time appellant and her attorneys regarded the original offer as still pending. Whether such is the effect of this letter or not, we do not deem it material what may have been the views or opinions of appellant or her attorneys on this subject, so long as those views or opinions were manifested by no acts on their part. Her offer having, in point of fact, been rejected, so as to be no longer binding on her, it cannot be material whether she or her attorneys supposed it to be still binding or not.

The judgment in this case being contrary to the rights of the parties, as shown by the evidence, it is hereby reversed and the cause remanded.

Reversed and remanded.

ANNIE BREATON

v.

SWEN JOHNSON.

PRACTICE—SCIRE FACIAS.—Where no writ of error has actually been issued, a plaintiff in error has no right to the writ of *scire facias* until a transcript of the record is filed in the Appellate Court.

ERROR to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Breaton v. Johnson.

Mr. JOSEPH SCHLERNITZAUER, for plaintiff in error.

Mr. ELLIOTT ANTHONY, for defendant in error.

BAILEY, J. In this case a motion is submitted by the defendant in error to quash the *scire facias*, and dismiss the suit. No writ of error has been issued, and at the time the motion was interposed, no transcript of the record sought to be reviewed had been filed in this court. It appears, however, that on the sixth day of April, instant, plaintiff in error filed with the clerk a *præcipe*, directing the issuance of a summons, and that the clerk, thereupon, in pursuance of such *præcipe*, as it may be presumed, issued a writ of *scire facias*, which, on the same day was served on the defendant in error.

Ordinarily, where a party seeks to bring a record into this court by writ of error, the practice is to sue out of the office of the clerk of this court a writ, directed to the clerk of the court below, commanding him to certify to this court such record, and the filing in this court of a transcript of the record below constitutes a return to such writ. By a practice established by the rules of the Supreme Court and of this court, a party, without having first actually sued out a writ of error, may in the first instance file in this court a transcript of the record below, and such transcript becomes, in effect, a return to a writ of error. In one case the issuing of the writ of error, and in the other the filing in this court of the transcript of the record, is the commencement of the suit in this court. Where no writ of error has been actually issued, the plaintiff has no right to the writ of *scire facias*, until the transcript of the record is filed here.

It follows that in this case the *scire facias* was improvidently issued and must be quashed, since at the time the motion was interposed no suit had been properly commenced in this court to review the record below, and, consequently, this court had no jurisdiction of the subject matter of such record, and so the motion to dismiss must be sustained.

Since the motion was submitted, a transcript of the record below has been filed by the plaintiff in error. Such transcript

C., R. I. & P. R. R. Co. v. Dingman.

might possibly give this court jurisdiction from the time of such filing, but it is no answer to the motion to dismiss, which must be decided upon the state of the record as it stood at the time the motion was interposed.

Motion to quash writ of *scire facias*, and to dismiss suit, sustained.

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THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD
COMPANY

v.

SARAH L. DINGMAN.

RAILROADS—INJURY IN ALIGHTING FROM CARS—NEGLIGENCE.—It is the duty of railway companies to provide for their passengers safe and convenient places for landing, and every reasonable facility for alighting with safety; but it is also incumbent upon the passengers, on their part, to exercise due care and caution to avoid injury. Where a proper landing place is provided, and the passenger knows or has the means of ascertaining its locality, he should make his exit at the place so provided; and if in attempting to alight elsewhere, he unnecessarily and negligently exposes himself to danger and is thereby injured, his injury is the result of his own act, and he cannot recover therefor against the railway company.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Mr. THOMAS F. WITHROW, for appellant, cited *The Pennsylvania Railroad Company v. Zebe*, 37 Pa. St. 420; *Lewis v. London, Chatham & Dover, R'y Co.*, 22 W. R. L. T. (N. S.) 397.

Mr. A. GARRISON and Mr. M. D. BROWN, for appellee, insisted that the court will not reverse where substantial justice has been done, and cited *Rowle v. Hughes*, 40 Ill. 316; *Ryan v. Brant*, 42 Ill. 78.

BAILEY, J. This was an action on the case, brought by ap-

pellee against appellant, to recover damages for injuries which appellee alleges she received while alighting from one of appellant's cars, at Thirty-first street, in the city of Chicago.

It appears that on the evening of the 10th day of December, 1873, appellee entered one of appellant's cars, at the station between Forty-seventh and Forty-eighth streets, paid her fare, and requested the conductor to let her off at Twenty-ninth street. He informed her that the train did not stop there, but stopped at Thirty-first street, where he would let her off. Appellee then asked the conductor to show her off on arriving at Thirty-first street, and he said he would do so.

At the time it was raining, and very dark. When the train reached Thirty-first street, the conductor came with a lantern in his hand to the north or front door of the car in which appellee was sitting, and announced the station, and then stepped down on the easterly side of the car at the front platform, and helped several passengers to alight from the train.

Appellee was sitting near the rear end of the car. She admits that she saw and heard the conductor as he came to the front door with a lantern and announced the station. Instead, however, of going to the front door where the conductor was, and where he was ready to assist her in alighting, she went to the rear door and stepped down on the westerly side of the car, it being so dark at the time as to render it impossible for her to see where she was likely to land, and in so doing, as she testifies, fell into a culvert situated on the westerly side of the track, and received the injuries of which she now complains.

The only reason appellee assigns for getting off at the rear end of the car, is, that she was sitting nearest that end, and feared that if she went to the front door, the cars might start before she got off. The record, however, fails to disclose any ground whatever for such fear. She testifies that the conductor, as soon as he had announced the station, disappeared from her view, but admits her inability to state whether he stepped down with his light and helped passengers off at the front end of the car, as she went out by the rear door and stepped down on the other side. A bystander, however, testifies positively to seeing the conductor step down from the platform, after announ-

C., R. I. & P. R. R. Co. v. Dingman.

cing the station, and help off some ten or twelve passengers.

It is alleged that appellant was negligent in leaving the culvert uncovered; in stopping the car where passengers, alighting, might fall into it, and in allowing appellee to get off over the culvert without any light or warning of danger. On the other hand, it is charged that appellee, in alighting from the car in the manner she did, was guilty of such a degree of negligence as must preclude her recovery.

It is unquestionably the duty of railway companies to provide for their passengers safe and convenient places for landing from their cars, and to furnish them with every reasonable facility for alighting with safety; but it is also incumbent on the passengers to exercise on their part due care and caution to avoid injury. Where a proper landing place is provided, and the passenger knows or has the means of ascertaining its locality, he should make his exit at the place so provided, and if, in attempting to alight elsewhere, he unnecessarily and negligently exposes himself to danger, and is thereby injured, his injury is the result of his own act, and he cannot recover damages therefor against the railway company.

In this case, it is not disputed that there was a safe and convenient landing place at the front end of the car; nor can it be doubted that had appellee attempted to pass out of the front door she would have had the assistance of the conductor, and would have had the benefit of the light of the conductor's lantern. She had requested his assistance because of its being so rainy and dark, and he had promised to give it. The conductor, on reaching the station, had appeared at the front door, and announced the station, thus notifying her where to go to avail herself of his assistance. It was but the dictate of the most ordinary prudence, under these circumstances, for her to go to the front door, and thus avail herself of the services of the conductor, which she had bespoken, and which she was invited to accept. The position of the conductor on the train was, under the circumstances, notice to her of the place where it would be safe to alight. Her conduct in going out of the rear door instead, and stepping off from the car on the side opposite the one where the conductor was standing with his

Nelson et al. v. Akeson.

lantern, and where it was so dark as to render it impossible for her to discern where she was about to land, is, in the light of the evidence, wholly irreconcilable with ordinary prudence on her part. We think her injury was the result of her own careless act, and it would be contrary to well established rules of law to permit her to recover damages therefor against appellant.

It is further insisted by appellant's counsel that the preponderance of the evidence shows that appellee was not in fact injured in the manner she claims. On this question the evidence was so far conflicting that we do not feel called upon to review it, and so express no opinion upon the point here made.

We think, however, the jury, in passing upon the question of appellee's negligence, found against the clear and manifest preponderance of the evidence, and for that reason we feel compelled to reverse the judgment, and direct that the cause be submitted to another jury.

Reversed and remanded.

SWAIN NELSON ET AL.

V.

PEHT AKESON.

1. TRYING CASES OUT OF ORDER—FIVE-DAY RULE.—The Practice Act provides a uniform practice in courts of record in respect to taking up and disposing of actions *ex contractu* out of their order on the docket, where there is no substantial defense. The rule of the Superior Court, known as the five-day rule, establishing a different practice, is inconsistent with the general law, and therefore void.

2. AMENDMENTS—PRACTICE.—Where a plaintiff had been allowed to amend his declaration so as to materially change the issues formed, it was error to refuse the defendants leave to file additional pleas, to meet the issues thus formed.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Nelson et al. v. Akeson.

Mr. I. K. BOYESEN, for appellants; that the so-called "five-day rule" was contrary to the statute, cited Booth v. Storrs, 54 Ill. 472; Fisher v. Nat. Bank of Commerce, 73 Ill. 34; Griswold v. Shaw et al. 79 Ill. 449.

That granting a motion for a speedy trial, after such a motion had been overruled at a previous term, was in contravention of all rules of practice: Merrick v. Peru Coal Co. 79 Ill. 112.

As to right to file additional pleas after amendment of the declaration: Griswold v. Shaw et al. 79 Ill. 449; Misch v. McAlpine, 78 Ill. 507; Souerbry v. Fisher, 62 Ill. 135.

Upon the question of recoupment as a defense: Higgins v. Lee, 16 Ill. 495; Low v. Forbes, 14 Ill. 423; Babcock v. Trice, 18 Ill. 420; Blood v. Enos, 12 Vt. 625; Schuchman v. Knoebel, 27 Ill. 175.

Mr. HENRY DECKER, for appellees; contended that the court has power, for good and sufficient cause, to order a speedy trial, and cited Rev. Stat. 777; Smith v. Third Nat. Bank, 79 Ill. 118; Titsworth v. Hyde, 54 Ill. 386; Wallbaum v. Haskin, 49 Ill. 313.

Upon the question of amendment: 1 Chit. Pl. 598; Brown v. Feeter, 7 Wend. 301; Beard v. VanWinkle, 3 Cow. 335; Ruler v. Bortim, 12 Wend. 110.

That leave to file additional pleas is discretionary, Haas v. Stenger, 75 Ill. 597; Misch v. McAlpine, 78 Ill. 507; Millikin v. Jones, 77 Ill. 372.

That additional pleas were unnecessary to enable appellant to show facts tending to establish a recoupment, Murray v. Carlin, 67 Ill. 286; Higgins v. Lee, 16 Ill. 495.

That the affidavit offered by appellant failed to show a good defense, Rev. Stat. 719; Laforge v. Matthews, 68 Ill. 328; Honeyman v. Jarvis, 64 Ill. 366; Hall v. Marks, 56 Ill. 125; Hough v. Gage, 74 Ill. 257; Evans v. School Com'rs, etc. 1 Gilm. 654; Sims v. Klein, Breese, 371; Purkett v. Gregory, 2 Scam. 44; Kinney v. Turner, 15 Ill. 182; Peck v. Brewer, 48 Ill. 54; Burroughs v. Clansey, 53 Ill. 30.

MURPHY, P. J. This was an action of assumpsit, com-

menced in the Superior Court of Cook county by the appellee, against the appellants. The declaration counts specially on two promissory notes, for the sum of three hundred dollars each, and contained the common counts, for work and labor, goods sold, etc. The trial of said cause in the court below resulted in a judgment against appellants, from which they prayed an appeal to this court, and ask the reversal of said judgment, and assign several errors, the first and third of which will be all that will be necessary for us to consider. The first assignment of error is, the Superior Court erred in ordering said cause to a trial under said rule, known as the five-day rule, because said rule is contrary to the Practice Act, and null and void, and because said motion for speedy trial out of the order of said cause on the docket, and before it had been placed on the trial calendar of said court, had already been made and overruled at the September term of said court, and the court had no power to allow said subsequent motion made at the October term.

Third. The court erred in refusing defendant leave to file additional pleas.

It appears that one of the rules of practice of that court is as follows:

“Ordered: That in any case *ex contractu*, pending on an issue or issues of fact only, or only requiring the *similiter* to be added, if the plaintiff, or an attorney or agent of the plaintiff, shall make an affidavit that he or she believes that the defense is made only for delay, the plaintiff, by giving the defendant's attorney, or the defendant, if he or she do not appear by attorney, five days' previous notice, with a copy of such affidavit, that the plaintiff will bring on said case for trial at the opening of court on a day to be specified in such notice, or as soon thereafter as the court will try the same, may proceed to a trial at the time specified in said notice, unless it shall be made to appear to the court, by affidavit of facts in detail, that the defense is made in good faith, when the case will remain to be tried in its regular order on the trial calendar.”

The first assignment of error involves the validity of this rule, judged of by the Constitution and laws of this State, regulating the practice in courts of record.

Nelson et al. v. Akeson.

In pursuance of section 29, Art. 6, of the present Constitution, the legislature enacted a general law to regulate the practice in courts of record, in force July first, 1872, R. S. of 1874, page 774.

By the 15th section of that act, the clerks are required to keep a docket of all causes pending in their respective courts, and in docketing civil cases shall set them down in the order of the date of their commencement, and by the 17th section, it is provided that "all causes shall be tried or otherwise disposed of in the order they are placed on the docket, unless the court, for good and sufficient cause, shall otherwise direct." The 37th section is: "If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the *nature* of his demand, and the amount due him from the defendant, after allowing the defendant all his just credits, deductions and sett-offs, if any, he shall be entitled to judgment, as in case of default, unless the defendant, his agent, or his attorney, if the defendant is a resident of the county in which suit is brought, shall file with his plea an affidavit, stating that he verily believes he has a good defense to said suit upon the merits to the whole, or a portion of the plaintiff's demand, and if a portion, specifying the amount, according to the best of his judgment and belief, upon good cause shown, the time for filing such affidavit may be extended for such reasonable time as the court shall order. No affidavit of merits need be filed with a demurrer, plea in abatement or motion, provided that if the plaintiff, his agent or attorney, shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merits; that he believes that plaintiff has testimony to support his claim against the defendant, which he cannot produce at that term of court, but expects to produce by the next term, the court shall continue such cause until the next term."

These sections of the statute provide a uniform practice in courts of record, in respect to the taking up and disposing of actions *ex contractu* out of their order on the docket, when there is no substantial defense. It will be seen that the rule of practice in the Superior Court known as the five-day rule,

above given, establishes a different practice from that provided by the statute for courts of record in this State.

In the case of *Fisher v. National Bank of Commerce*, 73 Ill. 37, the Supreme Court say that "if the plaintiff believes there is no valid defense to his claim, and desires a speedy judgment under the statute, he must file an affidavit with his declaration, showing the nature of his demand and the amount due him from the defendant, after allowing all his just credits, deductions and set-offs, if any; but under the rule of the Superior Court, he is simply required to make an affidavit that he believes the defense is made only for delay, and the defendant in such case, to entitle himself to a trial under the statute, is only required to file an affidavit with his pleas, stating that he verily believes that he has a good defense to the suit upon the merits, while under the rule of the Superior Court he is compelled to make it appear to the Court by affidavit of facts in detail, that the defense is in good faith. The practice being regulated by law, must, under the Constitution, be uniform; and from whatever source the Superior Court may have assumed to derive its authority to adopt the rule, inasmuch as it is inconsistent with the general law, it is void and of no effect.

It appears also that the appellee was allowed to amend his declaration by entering a *nolle prosequi* as to the account sued on, dismissing out of court all his cause of action founded upon open account, thus making a material change in the issues theretofore formed; and thereupon appellants asked leave to file additional pleas, which the court denied; the pleas proposed to be filed were for the purpose of setting up fraud as to \$200.00 of the consideration of said promissory notes. After the appellee was allowed to materially change his declaration, we think appellants had the right to plead to the declaration as thus changed.

Under the statutes, as thus interpreted by the Supreme Court, we think it clear that for the court to take up and try this case out of its order, on the trial calendar, after appellants had filed the affidavit of merits required by the statute, was error. We also think to refuse appellants the leave to file additional pleas to the appellee's declaration, after discontinuing his case as to

Gormley et al. v. Uthe.

the account sued on was also error. For these errors the judgment is reversed and the cause remanded.

Judgment reversed.

MICHAEL GORMLEY ET AL.

V.

GERTRUDE UTHE.

TRYING CASES OUT OF ORDER—FIVE-DAY RULE.—The rule of the Superior Court, permitting causes to be advanced and tried out of their order on the docket, is inconsistent with the Practice Act, and is void.

APPEAL from the Superior Court of Cook county, the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. MORTON CULVER, for appellants ; argued that plaintiff, having filed no affidavit with her declaration, was not entitled to a default, even though the defendants had not filed an affidavit of merits, and cited *Angel v. Plume & Atwood Mfg. Co.* 73 Ill. 412.

That the rule of the Superior Court is in contravention of the statute, *Fisher v. Nat. Bank of Commerce*, 73 Ill. 34; *Griswold v. Shaw*, 79 Ill. 449; *C. D. & V. R. R. Co. v. Bank of North America*, 9 Chicago Legal News, 12; *Beardsley v. Gosling*, 10 Chicago Legal News, 170.

Mr. W. H. CONDON, for appellee; insisted that the action of the court, in determining what is a good and sufficient cause for trying a case out of its order, cannot be reviewed, and cited *Smith v. Third Nat. Bank of St. Louis*, 79 Ill. 118; *Singer, etc. v. May*, 10 Chicago Legal News, 170.

MURPHY, P. J. This was an action of assumpsit, commenced in the Superior Court of Cook county, by appellee against appellants. The plaintiff in her declaration counted specially on five promissory notes made by appellants. The declaration also con-

Smith v. Lozano et al.

tained the common counts. To this declaration the appellants filed the plea of non-assumpsit, accompanied by an affidavit of merits. Notwithstanding the objection of the appellants, the court, on motion of the appellee, advanced and tried said cause out of its order on the docket, under and by virtue of a certain rule of practice existing in that court, known as the "five-day rule." This is assigned for error by the appellants. This case turns upon the validity of that rule. In Nelson and Benson v. Akesson, at this term, we have passed upon the validity of that rule, and held that the matters to which that rule relates are regulated by the Practice Act of July 1st, 1872, and that the rule, as a consequence, is "void and of no effect." The court below took up and disposed of the present case out of its order on the docket, and the judgment must, therefore, be reversed and the cause remanded.

Judgment reversed.

PETER SMITH

v.

FUSTENO LOZANO ET AL.

1. **SUIT ON AN APPEAL BOND—DISCONTINUANCE AS TO ONE OBLIGOR BY REASON OF BANKRUPTCY.**—In a suit against two defendants upon a bond, where one of the defendants pleads his bankruptcy, it is no doubt proper practice to proceed with the suit against all the defendants to final judgment, notwithstanding the adjudication in bankruptcy, and then enter an order staying execution against the bankrupt until the question of his discharge is determined; but it does not follow that no other course can be pursued. The plaintiff may discontinue as to the defendant alleging bankruptcy, and proceed to judgment against the other defendant. The obligation, which is the foundation of the action, is by statute declared to be joint and several, and the plaintiff may so treat it.

2. **LEVY OF EXECUTION—NOT ALWAYS A SATISFACTION.**—A levy upon a sufficient amount of personal property, is for some purposes deemed in law a satisfaction of the judgment; but it is a satisfaction *sub modo* only, and if, without the fault of the officer or the plaintiff, the levy becomes unavailing, it is not a satisfaction of the judgment.

3. **ESTOPPEL BY RECITALS IN THE BOND.**—The bond sued on recited a judgment, and covenanted for its payment upon its affirmance in Supreme

Smith v. Lozano et al.

Court, and the obligors are estopped by such recitals to deny the existence of a valid, unsatisfied judgment at the time the bond was executed. Although there had been a levy upon sufficient property to satisfy the judgment, yet appellants, by interposing their appeal bond to Supreme Court, suspended all proceedings under the levy, and they cannot now be permitted to insist that the levy was itself a payment and satisfaction of the judgment.

4. PROOF OF AFFIRMANCE OF JUDGMENT IN SUPREME COURT.—The third and fourth pleas being held insufficient on demurrer, the only remaining pleas were *non est factum* and payment of the judgment. The plea of *non est factum* only put in issue the execution of such a bond as was described in the declaration, and was fully met by the introduction of such a bond as was declared on. The plea of payment is a plea of confession and avoidance, and put in issue no averment of the declaration. Hence the averment that the judgment was affirmed, not being traversed, was admitted, and appellees were not bound to prove it.

5. TRYING CAUSE OUT OF ITS ORDER—DISCRETION OF THE COURT.—Were the record silent as to the grounds upon which the court acted in directing the cause to be brought on for trial out of its order, a presumption might be indulged in favor of the exercise of the discretion of the court below, but it affirmatively appears that the case was taken up under the "five-day rule" of the Superior Court, and not otherwise; hence any presumption of the exercise by the court of its discretion upon other grounds is excluded, and the action of the court must find its justification in the rule alone.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. JOHN M. GARTSIDE, for appellant; in support of the rule as to proceeding against all the defendants to judgment, cited *Byers v. First Nat. Bank*, 10 Chicago Legal News, 108; *Hoyt v. Frul*, 8 Abb. Prac. 220; *Bump on Bank'cy*, 687; *Ladd et al. v. Edwards, Breese*, 182.

As to plea of payment of the judgment, and satisfaction by levy, *Smith v. Hughes*, 24 Ill. 276; *Hood v. Moore*, 4 Gilm. 99; *Gregory v. Stark*, 3 Scam. 612; *Shepard v. Rowe*, 14 Wend. 263; *Wood v. Torrey*, 6 Wend. 564; *Harris v. Evans*, 81 Ill. 419; *Corbin v. Pearce*, 81 Ill. 461; *Herrick v. Swartwout*, 72 Ill. 340; *Ambrose v. Weed*, 11 Ill. 488; *Brush v. Seguin*, 24 Ill. 254.

As to taking up cases out of their order, *Smith v. Third Nat. Bank*, 79 Ill. 118; *McCormick v. Wells*, 83 Ill. 239.

Messrs. TENNEYS, FLOWER & ABERCROMBIE, for appellees;

Smith v. Lozano et al.

contending that plaintiffs might discontinue as to one of the obligors who had suggested his bankruptcy, and proceed against the other, cited Rev. Stat. 620; Evans v. Lohr, 2 Scam. 511; Wallace v. Curtis, 36 Ill. 156; Com. Ins. Co. v. Treasury Bank, 61 Ill. 482.

That the court has power to order a case tried out of its order, Rev. Stat. 777; Linnenmeyer v. Miller, 70 Ill. 244.

That the plea of *non est factum* admits all the material allegations of the declaration, denying merely the execution of the bond, Pritchett et al. v. The People, use, etc. 1 Gilm. 525.

BAILEY, J. This was an action of debt upon an appeal bond given upon an appeal from a judgment of the Superior Court of Cook county to the Supreme Court.

The declaration alleges that on the 17th day of April, 1876, one Patrick L. Garrity as principal, and appellant as surety, executed to appellees an appeal bond in the penalty of \$1,500, which bond, after reciting the recovery on the 6th day of April, 1876, of a judgment in said Superior Court in favor of appellees against said Garrity for \$934.49 and costs, and the taking of an appeal therefrom to the Supreme Court, was conditioned for the prosecution of said appeal and the payment of said judgment, interest, costs and damages, in case of the affirmance of said judgment by the Supreme Court.

The declaration further alleges an affirmance of said judgment by the Supreme Court on the 22d day of June, 1877, and the non-payment thereof by said Garrity.

The suit was originally commenced against appellant and Garrity jointly, who both appeared and filed their pleas of *nil debet*. Subsequently Garrity was adjudicated a bankrupt, and thereupon filed a certified copy of the order of adjudication of bankruptcy, and asked that the proceedings in the suit be stayed, as to him, to await the determination of the bankruptcy court on the question of his discharge. Leave was thereupon granted appellees on their motion, against the objection and exception of appellant, to discontinue the suit as to Garrity, and to file an amended declaration against appellant alone. The suit was subsequently prosecuted and judgment

Smith v. Lozano et al.

rendered against appellant, from which judgment this appeal is prosecuted.

The first error assigned is the granting of appellees' motion to discontinue the suit as to the principal obligor, before the result of the bankruptcy proceedings was determined, and permitting appellees to proceed to judgment against the surety alone.

We are referred, in support of this assignment, to the recent case of *Byers v. The First National Bank*, 10 Legal News, 108, in which the Supreme Court hold that in such cases the proper practice is to proceed with the suit against all the defendants to final judgment, notwithstanding the adjudication of bankruptcy, and then enter an order staying execution against the bankrupt until the question of his discharge is determined.

It cannot be doubted that it would have been a proper practice had appellees pursued the course thus indicated by the Supreme Court, but it does not follow that no other course of proceeding was open to them. The obligation which is the foundation of the suit, is, by the statute declared to be both joint and several, and appellees were at liberty to treat it either as joint or several. Their suit might properly in the first instance have been brought against appellee alone, and their bringing suit against both obligors jointly, did not debar them of the right to discontinue as to one obligor and proceed to judgment against the other. This right existed wholly independent of the bankruptcy proceedings, or the provisions of the bankrupt act, and the mere fact that one of the obligors was adjudicated a bankrupt did not divest it.

The next error assigned is the sustaining of a demurrer to appellant's third and fourth pleas.

These pleas allege that on the day of the rendition of the judgment against Garrity, an execution was issued thereon, which, on the following day, and before the filing of the appeal bond, was levied upon a sufficient amount of the goods and chattels of Garrity to satisfy the judgment, and that such levy is still in full force. The fourth plea further avers the execution by Garrity to the sheriff of a delivery bond, conditioned

for the safe keeping of said property and the return thereof to the officer according to law, and that said property then and there was, and still is, in the possession of said sheriff.

The theory of these pleas is that by this levy the judgment against Garrity was satisfied, in contemplation of law, before the execution of the appeal bond, and that appellees cannot now insist that said judgment is outstanding and unpaid.

It is undoubtedly true that a levy upon a sufficient amount of personal property, is, for some purposes, deemed in law to be a satisfaction of the judgment, but it is a satisfaction *sub modo* only, and if, without the fault of the officer or plaintiff the levy becomes unavailing, it is not a satisfaction of the judgment. Rorer on Judicial Sales § 1,012; Curtis v. Root, 28 Ill. 367; Smith v. Hughes, 24 Id. 276; Green v. Burke, 23 Wend. 490.

But we think the obligors are estopped by their bond to deny the existence of a valid, unsatisfied judgment, at the time the bond was executed. The bond recites a judgment, and covenants for its payment upon its affirmance by the Supreme Court. Such covenant is wholly inconsistent with the position that the judgment was already paid.

Again, although it is true that a levy was made sufficient to satisfy the judgment, yet before such levy was made available for the purpose of actual payment, the obligors, by interposing their appeal bond, suspended all proceedings under it, they undertaking to pay the judgment themselves, in case of an affirmance. It would be in violation of both legal and equitable principles to permit them now to insist that the levy with the operation of which they had thus interfered, and which they had been permitted to suspend upon their express undertaking to pay the judgment themselves, was itself a payment and satisfaction of the judgment, and a discharge in advance of the liability assumed by them upon the execution of their bond.

It is next urged that the judgment should be reversed on account of the failure of appellees to prove on the trial that the judgment appealed from had been affirmed by the Supreme Court.

Smith v. Lozano et al.

The record fails to show that such proof was made, and we therefore think the evidence insufficient to support the verdict, unless the fact of such affirmance was admitted by the pleadings. The third and fourth pleas being held insufficient on demurrer, the only pleas remaining in the case were, first, *non est factum*, and second, payment of said judgment in full on the 6th day of April, 1877.

By the plea of *non est factum*, appellee merely denied the execution by him of such a bond as was described in the declaration. This was the only fact put in issue by that plea, and appellees fully made out their case, so far as that plea was concerned, by the introduction of such a bond as they had declared on. *Pritchett et al. v. The People*, 1 Gilm. 525; *Legg v. Robinson*, 7 Wend. 194; *Gardner v. Gardner*, 10 Johns. 47; *Uttler v. Vance*, 7 Blackf. 514.

The plea of payment is a plea in confession and avoidance, and consequently put in issue no averment of the declaration. The averment that the judgment was affirmed not being traversed by any plea, was admitted, and appellees were not bound to prove it.

The only remaining error assigned, is the order of the court below directing this cause to be taken up and tried out of its regular order on the docket under the provisions of a rule of the Superior Court known as the "five-day rule."

The question of the validity of this rule of practice of the Superior Court is not now an open one, the rule having been repeatedly held by the Supreme Court, to be inconsistent with the general law, and therefore void and of no effect. *Fisher v. National Bank of Commerce*, 73 Ill. 34; *Kidder v. Rand et al.* Id. 38. See also, *McCormick v. Wells*, 83 Id. 239.

But it is insisted that even admitting the invalidity of this rule, the order of the court below may be sustained as an exercise of the discretion, to try causes out of their order "for good and sufficient cause," vested in the court by § 16 of the Practice Act, and that it will be presumed that some good and sufficient cause existed, justifying, in this case, the exercise of the discretion.

Were the record silent as to the grounds upon which the

McBean v. Fox et al.

court below acted, in directing this cause to be taken up and tried out of its order on the docket, such presumption, perhaps, might be indulged in. But it affirmatively appears from the record, that the proceeding by which the cause was taken up and tried out of its order, was under said "five-day rule," *and not otherwise*. Any presumption of the exercise by the Court of its discretion upon any other "good and sufficient cause" is excluded, and the action of the court in that behalf must find its justification in the rule alone.

For the error committed by the court below in ordering this cause to be tried out of its order on the docket under the "five-day rule," the judgment must be reversed and the cause remanded.

Reversed and remanded.

JOHN McBEAN
v.
HARRY FOX ET AL.

1	177
99	1187
1	177
100	1406

1. **DECEIT—MOTIVE—IMPLIED FRAUD.**—In an action for deceit in the sale of personal property, the representation made must be untrue, the party making it must know that it is false, and the party to whom it was made must have relied on the representation as true, and have been induced to act upon it. But when these facts exist, it is immaterial what may have been the actual motive with which the representation was made. If a party makes a representation which he knows to be false and which is calculated to induce another to act upon it, and thereby occasions an injury, the law implies fraud, and it is not incumbent upon the plaintiff to prove a fraudulent motive.

2. **EVIDENCE OF GOOD CHARACTER.**—In actions of this character, evidence of general business integrity is not admissible to repel the presumption of fraud.

3. **DECLARATIONS OF AGENT.**—The representations in question were made by a broker in negotiating the sale of a promissory note; *Held*, that the making of such statements was fairly within the scope of his agency, and that the general power to negotiate would by implication include the power to give such information as would ordinarily be called for.

4. **PROOF OF CLAIM IN BANKRUPTCY.**—The fact that the plaintiff had

McBean v. Fox et al.

proved his claim in bankruptcy against the defendants, and received a dividend thereon, does not estop him from proceeding against the defendants in an action for deceit in making the sale.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

MESSRS. MILLER & FROST, for appellant; argued that where the acts of an agent will bind his principal, his representations as to the subject matter will also bind him, and cited *Sanford v. Handy*, 23 Wend. 265; *American Fur Co. v. United States*, 2 Pet. 364; *Jeffrey v. Bigelow*, 13 Wend. 518; *Story's Agency*, § 134; 4 Tenn. R. 177; *Mower v. Hapworth*, 10 M. & W. 147; 13 Pet. 262; 2 Kent. Com. 482; *Schneider v. Heath*, 3 Camp. 506; *Parsons v. Watson*, 2 Camp. 785; *Fuller v. Wilson*, 3 Ad. & Ellis (N. S.) 56; *Lobdell v. Baker*, 1 Met. 193; *Hunter v. Hudson R. R. Co.* 20 Barb. 206; 1 Par. on Con. 620; *Nat. Exch. Co. v. Drew*, 32 Eng. L. & Eq. 1; *Bennett v. Judson*, 21 N. Y. 238.

That a representation, false in fact, though not proceeding from an immoral motive, is a fraud in law, and is the subject of an action for deceit: *Polhil v. Walter*, 3 B. & Ald. 114; *Foster v. Charles*, 6 Bing. 396; *Smith's L. Cas.* 6th Ed. 284.

Misrepresentation of a material fact constitutes a legal fraud, if acted upon, even though innocently made: *Frenzel v. Miller*, 37 Ind 1; *Elder v. Allison*, 45 Geo. 13.

A principal cannot enjoy the benefit arising from the act of his agent without adopting the instrumentality by which it was accomplished: *Elwell v. Chamberlain*, 31 N. Y. 611; *Smith v. Tracy*, 36 N. Y. 79.

The court erred in permitting defendants to introduce evidence of their general reputation for business integrity: *Gough & Herring v. St. John*, 16 Wend. 645.

That the facts proved clearly establish a cause of action, and that proof of *scienter* was unnecessary: *Gough & Herring v. St. John*, 16 Wend. 645; *Hilliard on Trusts*, 13; *Bennett v. Judson*, 21 N. Y. 238; *Elwell v. Chamberlain*, 31 N. Y. 611; *Smith v. Tracy*, 36 N. Y. 79; *Frenzel v. Miller*, 37 Ind. 1; *Elder v. Allison*, 45 Geo. 13; *Monroe v. Pritchell*, 16 Ala. 768; *Milne v. Marwood*, 28 Eng. L. & Eq. 373.

McBean v. Fox et al.

Messrs. TENNEYS, FLOWER & ABERCROMBIE, for appellees; as to the representations made by the broker, cited *Merwin v. Arbuckle*, 81 Ill. 501.

As to authority of agent: *Whart. on Agency*, § 127.

Upon the admissibility of evidence of general good business reputation: 1 *Greenl. Ev.* § 54.

BAILEY, J.—In this case, appellant brought suit against appellees to recover damages for deceit in the sale and negotiation to him of a promissory note, of which the following is a copy:

“\$3,000.

CHICAGO, March 9th, 1875.

“Ninety days after date, we promise to pay to the order of Messrs. Atkins & Burgess, three thousand dollars, payable at our office, 90 and 92 Dearborn St., value received, with interest at ten per cent. per annum, after maturity.

FOX & HOWARD.”

This note was indorsed in blank by Atkins & Burgess, the payees, and there also appeared on the back of it the following guaranty:

“For value received, we hereby guarantee the payment of the within note at maturity, with interest at ten per cent. until paid, and agree to pay all costs and expenses, paid or incurred in collecting the same.

“ATKINS & BURGESS.”

The evidence shows that for a number of years prior to this transaction, the firm of Fox & Howard, consisting of Harry Fox and William B. Howard, had been extensively engaged as contractors, upon various public works, and especially in the building of bridges, and had acquired a considerable reputation for pecuniary responsibility; also that the firm of Atkins & Burgess, consisting of Charles H. Atkins and Thomas Burgess, were manufacturers of iron work, and had dealt quite largely with Fox & Howard, by way of furnishing them with iron work in their building enterprises. After the panic of 1873, the business of Fox & Howard rapidly declined, and

McBean v. Fox et al.

they became embarrassed with debts to a large amount, so that at the time of the transaction with appellant, they were owing about \$150,000, besides some \$80,000 or \$100,000 more, secured on real estate.

In order to maintain their credit, Fox & Howard had then, for some time, been compelled to resort to a system of borrowing, to pay their paper as it matured. As a scheme for raising money, an arrangement, as it seems, was entered into, by which Fox & Howard were to execute their promissory notes in various sums, payable to the order of Atkins & Burgess, and the latter firm were to indorse and guarantee the same, which paper was thereupon to be placed upon the market and sold, and the proceeds used for the benefit of Fox & Howard.

In pursuance of this scheme, a large number of these notes were executed and placed in the hands of different brokers in Chicago, for negotiation. Among others, one Long, a broker, was employed for this purpose, and the note in question, and others of like character, amounting in all to nearly \$35,000, were delivered to him for sale. Long thereupon proposed to a son of appellant, who at the time had in his hands moneys of his father to loan, to buy this \$3,000 note, and offered to sell it at a discount of two per cent. per month. It seems that appellant and his son had some acquaintance with the reputed financial standing of Fox & Howard, and also with the general character of the business in which they had been engaged; but so far as appears from the evidence, they were ignorant of the existing financial embarrassments of that firm, and of the purposes for which these notes were executed and placed upon the market.

The son communicated this offer to the father, and the next day the two met Long at their office, whereupon inquiries were made by appellant and his son about the character of the paper, the circumstances of its execution, and whether it was legitimate business paper.

The son, it seems, was somewhat suspicious that the note was not business paper, but only given in renewal of, and to take up an old note, from the fact that its amount was the same as

that of other paper of the same parties which he had previously seen.

Appellant also objected to taking it, because, in his opinion, no person doing a legitimate business, could afford to pay the discount offered. Long then explained that Fox & Howard had contracts to build six bridges, for which they were not to be paid until the bridges were completed; that they had let the iron work in these bridges to Atkins & Burgess, upon the same terms of payment; that Fox & Howard had advanced this paper to Atkins & Burgess to assist them in getting out the iron work, and that Atkins & Burgess were to lose the discount, as they were the parties to whom the money realized on the notes was to go.

Before the transaction was closed, appellant's son, as a matter of further precaution, called on Howard, of the firm of Fox & Howard, and after explaining that this note was offered to a friend of his, inquired of him its character, and received in reply substantially the same explanation given by Long. After hearing these representations, and believing them to be true, appellant purchased the note, and paid therefor a fraction over \$2,814.

It seems that this particular note was placed in Long's hands by Atkins, and there is evidence tending to show that Atkins, on leaving it with Long, gave him the same account of its execution and character afterwards given to appellant and his son by Long.

At the time of these transactions, Fox & Howard had in fact no contracts whatever for the building of any bridges, and the representations made to appellant and his son of the consideration of the note, were wholly untrue; this and the other notes issued under like circumstances, being mere accommodation paper, executed for the mere purpose of raising money for Fox & Howard. The total amount of these notes negotiated by Long and other brokers, between the first day of February and the twenty-sixth day of April, 1875, was about \$75,000. There is proof in the record that several of the other notes were sold by Long and other brokers to various parties, upon substantially the same representations made to appellant.

McBean v. Fox et al.

It appears that Fox & Howard, yielding to the pressure of their financial embarrassments, were adjudicated bankrupts upon a petition filed against them May 28th, 1875, and that a like adjudication against Atkins & Burgess was entered upon a petition, filed June 8th, 1875.

The jury, upon the trial below, found a verdict for appellees. A motion by appellant for a new trial being denied, judgment was rendered on the verdict against him for costs.

The first error assigned, which we deem it necessary to consider, presents for review the instructions given to the jury by the Court, at the instance of appellees.

The first and fourth of said instructions are as follows:

"1. The plaintiff is not entitled to recover in this case, unless the jury believe, from the evidence, that the defendants made the representations alleged in the declaration, or some material portion of them; that such representations, or some material part of them, were false and were made with the intent to defraud the plaintiff, and that the plaintiff was induced by such representations to part with his money to defendants."

"4. The intent with which representations are made should control the mind of the jury in determining this case. If the jury believe, from the evidence, that the witness Long in fact made the representations alleged in plaintiff's declaration, and believe the representations so made were untrue, yet in order to find for the plaintiff, they must further believe, from the evidence, that said representations were made by the authority of the defendants, and with the intent, on their part, to willfully deceive and cheat the plaintiff."

The law is well settled that to recover in an action for deceit, the representation must be untrue; the party making it must know that it is false, and the person seeking to recover must have relied on the representation as true, and have been induced to act upon it: *Merwin v. Arbuckle*, 81 Ill. 501; *Wheeler v. Randall*, 48 Id. 182; *Hiner v. Richter*, 51 Id. 299. These facts concurring, it is immaterial what may have been the actual motive with which the representation was made.

If a party makes a representation which he knows to be

false, and which is calculated to induce another to act on the faith of it, and occasions injury thereby, the law implies fraud, and it is not incumbent upon the plaintiff to prove a fraudulent motive, nor is it competent for the defendant to disprove it. Such motive arises as a conclusion of law. In *Foster v. Charles*, 6 Bing. 396, Tyndal, C. J., says: "It has been urged that it is not sufficient to show that a representation on which a plaintiff has acted was false within the knowledge of the defendant, and that damage has ensued to the plaintiff, but that the plaintiff must also show the motive which actuated the defendant. I am not aware of any authority for such a position, nor that it can be material what the motive was. The law will infer an improper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff." See, also, *Foster v. Charles*, 7 Bing. 105; *Corbett v. Brown*, 8 Bing. 33; *Polhill v. Walter*, 3 Barn. & Adolph. 114.

By these instructions the burden was imposed upon appellant to prove, not only that the representations were false to the knowledge of appellees, and that appellant was thereby defrauded, but also that there was in fact an affirmative intention on the part of appellees to produce that result. In this we think they were clearly erroneous.

The seventh instruction given on behalf of appellees, was as follows:

"7. The jury are instructed that the plaintiff cannot recover in this case, unless they find from the evidence that the said defendants, or some of them, did falsely, fraudulently and deceitfully represent to said witness Long, for the purpose of having the same communicated to the plaintiff, or whoever might become the purchaser of the note referred to in the declaration, and expecting the same would be communicated to the plaintiff in substance" (then follows a recital of the several false representations complained of, as the same are alleged in the declaration).

By this instruction, the representation shown by the evidence to have been made by Howard in person to appellant's son, is entirely ignored, and in effect withdrawn from the consideration of the jury.

McBean v. Fox et al.

This evidence was properly in the case, and the jury should have been permitted to consider it. If Howard himself made these representations, knowing them to be false, and thereby induced appellant to purchase the note, then, as to him, at least, appellant was entitled to recover.

But it is insisted that the declaration only avers fraudulent representations made through the agency of Long, and that under the averments of his declaration, appellant was not entitled to recover on the ground of false representations made by Howard in person.

Had it been objected to this evidence when offered, that it varied from the declaration, the court might properly have excluded it, or the plaintiff, having his attention thus called to the variance, might have asked and obtained leave to so amend his declaration as to make it accord with his proofs. No objection to the admission of this evidence seems to have been interposed, and so it was properly before the jury, and the court should not, by an instruction, have ignored its existence, and thus compelled the jury to disregard it.

But we think this instruction is otherwise objectionable. If appellees, in fact, placed this note in the hands of the broker for negotiation, and on doing so made to him any statements as to its character or consideration, without any restrictions upon him as to the uses to be made of such information, it does not seem to us to be material whether appellees, at the time, purposed or expected that such information would be communicated to the purchaser of the note, nor should the burden of proving such purpose or expectation be thrown upon the purchaser. The broker, in the execution of his agency, was at liberty to use the information thus obtained, and his doing so would be binding on his principals.

Moreover, in our opinion, the statements made by Long to appellant were fairly within the purview of his agency. In negotiating the note he was vested with power to do such acts and give such information as would be usual in making such negotiation in the ordinary course of business. No ordinarily prudent man would be likely to purchase such a note in the market without requiring information as to its character, as to

being business or accommodation paper, etc., and a general power to negotiate, would, by implication, include the power to give such information as would ordinarily be called for and expected in such a transaction. But independently of this view, it is a well settled rule, applicable to special as well as general agents, that where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*. Story on Agency, § 134; Sanford v. Handey, 23 Wend. 260; American Fur Company v. The United States, 2 Pet. 364; Jeffery v. Bigelow, 13 Wend. 518.

This responsibility extends even to fraudulent representations made by the agent in the course of the execution of his authority. The agent is held out by the principal as fit to be trusted, and his fidelity and good conduct in the matter are thereby impliedly recommended, and where one of two innocent persons must suffer by the fraudulent act of a third, the one who enables such third person to commit the fraud must bear the loss. Sanford v. Handy, *supra*.

In Lobdell v. Baker, 1 Met. 193, it was held that where a broker makes sale of a note in the usual line of his business, his representations bind his principal, although they are made contrary to the principal's express instructions, unless such instructions are known to the purchaser.

Upon the principles already laid down, we think appellee's eleventh instruction was erroneous. That instruction was as follows:

"11. The jury are instructed as a matter of law, that a note broker, by virtue of his employment as such, has no authority to make any special representations as to the contracts of his customers, or as to the use the proceeds of the note he is authorized to sell is to be applied, and that if the broker Long made any such special representations to plaintiff concerning Fox & Howard, contractors, or the use to which the proceeds of the note were to be applied, and had no special authority from any defendant to make the same, then the defendants are not bound by such representations."

McBean v. Fox et al.

Upon the trial appellees were permitted, against the objection and exception of appellant, to give proof of their own standing and reputation for business integrity, and the admission of such evidence is assigned for error.

As a general rule, evidence of good character is confined to criminal prosecutions, involving questions of moral turpitude. There are, it is true, some exceptions, consisting of that class of actions where general character is drawn in question by the pleadings or points involved in the cause. In slander, the plaintiff's general moral character is an object of inquiry, with a view to the amount of damages he is entitled to claim. Cases of seduction, criminal conversation, and breach of promise of marriage, are also exceptions, and there are doubtless others. But where a civil action is brought for an injury to rights of property, though the injury is legally criminal, and involves moral turpitude, so that on an indictment evidence of character would be obviously receivable, the authorities are against its admissibility.

Civil actions, in which cruelty, gross fraud and even forgery is charged, are frequently presented with results deeply affecting the reputation of the defendant, yet we think, in such cases, it would be contrary to well established principles of the law of evidence, to permit the defendant to repel the proof of such charges by showing a good reputation. *Gough v. St. John*, 16 Wend. 645. In opposition to this view we are cited to 1 Greenleaf on Ev. Sec. 54, where the learned author says that: "Generally, in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general character is admissible to repel it." This proposition laid down by Mr. Greenleaf, seems to be based upon the authority of an early case in New York, which has now long since been overruled in that State. But even the case there cited entirely fails to justify the admission of this class of evidence in the case at bar. There the *acts* charged against the defendant were clearly proved, but the *fraudulent intent*, not being an inference of law, was sought to be inferred from slight circumstances, and to repel such inference, proof of good reputation was held properly admitted. In the present case, how-

ever, as we have already held, when it is established that the plaintiff has received injury in consequence of false representations made to him by the defendants, with knowledge of their falsity, the fraudulent intent follows as a *necessary legal conclusion*, and so cannot be rebutted by proof of good character or otherwise. We think the admission of this evidence was error.

But it is insisted by counsel for appellees, that even if appellees are chargeable with the false representations alleged, such representations were immaterial, as they affirmed nothing in regard to the value of the note, the solvency of the makers or indorsers, their ability or willingness to pay, or anything in which appellant had any interest. In this view we are unable to concur. These representations, in our opinion, were directly material, as bearing upon the ability of the makers to pay the note, and the resources likely to be at their command for that purpose. If Fox & Howard had been, at the time, in the execution of a contract to build several bridges, for which they were in due time to receive the very funds out of which this note was to be paid, the payment of the note at maturity was assured. If, on the other hand, appellant had been informed that the paper was accommodation paper, and was merely a means of borrowing money to pay an existing liability, and would itself be likely to be paid only in case the makers should be successful at its maturity in effecting further loans, he would undoubtedly have declined the purchase, and thus saved himself the loss he has sustained.

The evidence shows that appellant proved up his note in the Court of Bankruptcy, against the estates of Fox & Howard, and of Atkins & Burgess, and received, upon distribution of the assets of those estates, a dividend amounting to \$630.

It is insisted, on behalf of appellees, that appellant, having elected to treat his note as a valid contract between him and appellees, and having proceeded in the manner and to the extent above indicated, to enforce the same against thier estates, is now precluded from the recovery of damages for the alleged fraud and deceit in the negotiation of the note.

In this we think they are in error.

 RAUH v. RITCHIE.

Had appellant, on discovering the fraud, desired to sue for and recover back the original consideration paid by him, he would unquestionably have been compelled to rescind and repudiate the contract before he could be permitted to maintain such suit. This case stands upon entirely different principles.

In order to recover for the deceit, he is not obliged to restore the property purchased, but may retain and avail himself of such property, to the extent of its value, and his doing so can only be considered upon the question of damages, in his action for the tort.

Other questions are raised by counsel in their arguments, which we do not deem it necessary to consider, but for the errors above noticed, the judgment will be reversed and the cause remanded.

Reversed and remanded.

 STEPHANI RAUH, Executrix, etc.

v.

WILLIAM C. RITCHIE, Executor, etc.

1. DISTRESS FOR RENT—DEATH OF TENANT PENDENTE LITE—SURVIVORSHIP OF ACTION.—A proceeding against a tenant for the collection of rent, whether it be by the common law actions of covenant, debt or assumpsit, or by distress, survives upon the death of the tenant, and may be prosecuted against his executor or administrator. Such a proceeding is made by statute analogous to proceedings in cases of attachment, and the rules of practice in attachment are adopted and made applicable to proceedings by distress for rent.

2. AMENDMENT OF JUDGMENT—WHEN TO BE UPON NOTICE.—By mistake of the clerk in entering up judgment in this case, the substitution of the executrix as party defendant was overlooked, and the judgment was entered against the deceased tenant. Nearly eighteen months after the entry of judgment, an order was entered correcting the judgment, but without notice to plaintiff in error; *Held*, that while courts have authority over their records to correct clerical errors, and, if done at the term in which judgment is rendered, without notice, it is error to allow an amendment, even in matters of form, at a subsequent term, without notice, and an amendment so made is a nullity.

1	188
148s	90
1	188
57	35
1	188
159s	319
1	188
102	2576

Rauh v. Ritchie.

3. **AWARDING EXECUTION—GENERAL AND SPECIAL.**—The judgment as originally entered, awarded a general execution and also special execution against the property distrained. Afterwards, on notice to plaintiff in error, an order was entered directing that the judgment be paid in due course of administration, but the order for special execution against the property distrained was left unchanged; *held*, that the first amendment being a nullity, the record still showed a judgment against the deceased tenant, and the order to pay the judgment in due course of administration had no force.

4. **RELEASE OF PROPERTY BY BOND.**—The property distrained was released by giving bond as provided in the statute. *Held*, that the specific lien upon the property seized was thereby at an end, and it could not be taken from the executrix by special execution. The only remedies left the landlord were by enforcing payment in due course of administration, or by suit upon his bond.

ERROR to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

MR. HORACE G. LUNT and MR. ADOLPH MOSES, for plaintiff in error; contending that proceedings by distress for rent abated upon the death of the tenant, cited Rev. Stat. 659; Rev. Stat. 97; Rev. Stat. 126; Davis v. Shapleigh et al. 19 Ill. 386; Tidd's Prac. 1,024; Lahey v. Brady, 1 Daly, 443.

That the amendment of judgment without notice was void: Swift v. Allen, 55 Ill. 303; O'Connor v. Mullen, 11 Ill. 57; Sears v. Low, 2 Gilm. 281; Coughran v. Gutchens, 18 Ill. 390.

That special execution cannot issue after the property has been released by bond: Rev. Stat. 660.

That the lien of the landlord upon the property became lost upon the giving of a bond to release it: Speer v. Skinner, 35 Ill. 282.

MESSRS. HUTCHINSON & LUFF, for defendants in error; argued that proceedings by distress should be governed by the same rules of practice as are provided in attachment cases: Rev. Stat. 660, § 20; Rev. Stat. 153, § 3; Davis v. Shapleigh, 19 Ill. 386.

That the action survived and could be maintained against the executrix: Rev. Stat. 269, § 1; Braithwaite v. Cooksey, 1 H. Bl. 465; Penny v. Little, 3 Scam. 301.

Rauh v. Ritchie.

The mistake in entering the judgment was a mere clerical error, and amendable without notice: Rev. Stat. 137, §§ 2-7; *Mitcheltree v. Sparks*, 1 Scam. 122; *Duncan v. McAfee*, 3 Scam. 93; *Sheppard v. Wilson*, 6 How. 273; *Balch v. Shaw*, 7 Cush. 282; *Galloway v. McKeithen*, 5 Ired. 12; *Smith v. Branch Bank*, 5 Ala. 26; *Cook v. Wood*, 24 Ill. 295.

The error in the form of the judgment may be corrected, and the proper judgment entered in the Appellate Court: *Albee v. Wachter*, 74 Ill. 173; *Yarborough v. Scott*, 5 Ala. 221; *Kent v. Lyles*, 7 Gill. & J. 73.

BAILEY, J. On the 2d day of March, 1874, Henry Ritchie, the testator of the defendants in error, as the landlord of John C. Rauh, the testator of the plaintiff in error, caused a distress warrant to be issued, and levied on the goods and chattels of said Rauh. The distress warrant, together with an inventory of the property levied upon, was filed in the Superior Court; summons to the tenant was duly issued and served, and the property distrained was afterwards released, by the tenant entering into bond with sureties as required by the statute.

Pending the proceedings Rauh died, and upon suggestion of his death on the record, it was ordered that the suit be prosecuted against Stephani Rauh, his executrix. Summons against the executrix was thereupon issued and duly served, and afterwards, on the first day of June, 1875, the cause came on for trial before the court without a jury, and judgment was rendered in favor of the plaintiff for \$235 and costs.

Among the errors assigned is the order of the court, entered upon suggestion of the death of the tenant, permitting the suit to be prosecuted against his executrix.

It is insisted that a distress for rent does not survive the death of a tenant dying *pendente lite*, and that consequently the proceedings were abated and could not be prosecuted against the personal representatives of the tenant.

We are referred to no authority supporting the doctrine here contended for, and in the absence of authority, it would seem to us that, upon principle, a proceeding against a tenant for

Rauh v. Ritchie.

the collection of rent, whether it be by the common law action of covenant, debt or assumpsit, or by distress, survives upon the death of the tenant, and may be prosecuted against his executor or administrator.

But we think this question, if otherwise doubtful, is settled by statute. Chapter 80, of the Revised Statutes, after providing in section 16, as to the property liable to seizure upon a distress warrant; in section 17, for the return of the warrant, and the making and filing of an inventory of the property levied upon; in section 18, for the issuing and return of summons to the tenant, and in section 19 for constructive service by publication of notice, in case of the non-residence of the tenant, provides in section 20 that "the suit shall thereafter proceed in the same manner as in case of attachment before such court or justice of the peace." By this provision, the rules of practice applicable to proceedings by attachment are adopted, and made applicable to proceedings against a tenant by distress warrant.

By section 3 of the act in regard to attachments in courts of record (R. S. 1874, p. 155), it is provided that "heirs, executors and administrators of deceased defendants shall be subject to the provisions of this act in all cases in which it may be applicable to them." In *Davis v. Day*, 19 Ill. 386, it was held that under this provision of the Attachment Act, an attachment proceeding does not abate by the death of the defendant. We think there was no error in allowing the suit to be prosecuted to final judgment against the executrix of the deceased tenant.

It appears, that notwithstanding the substitution of the executrix for the deceased tenant, as party defendant, the clerk of the court below in entering up the judgment, by mistake, overlooked the change of parties, and entitled the judgment order in a suit of "*Henry Ritchie v. John C. Rauh*," and the judgment as originally entered was, in form, a judgment against John C. Rauh.

The judgment thus entered was manifestly erroneous, and until put in proper form, it gave the plaintiff no rights as against the executrix of the defendant.

Rauh v. Ritchie.

On the 12th day of December, 1876, nearly eighteen months after the entry of the judgment, an order was entered in the court below without notice to plaintiff in error, giving leave to the clerk to amend the record of the judgment "by changing the name of the defendant therein to Stephani Rauh, executrix of John C. Rauh, deceased," and the record was amended accordingly.

We have no doubt of the authority of the court below to allow this amendment on proper notice to plaintiff in error. It was the correction of a mere clerical error, which all courts have the power, in their discretion, at any time to allow. During the term at which the judgment was rendered, and while the record was before the court, an amendment of this character could properly have been made without notice, as at that time the parties were all in court. But after the term was passed the parties were no longer before the court, and had a right to regard the case as finally disposed of.

An amendment, even in a matter of form, could not properly be allowed at a subsequent term without notice, and this amendment having been made without notice, was a nullity. *O'Connor v. Mullen*, 11 Ill. 57; *Swift v. Allen*, 55 id. 303; *Coughran v. Gutchens*, 18 id. 390.

The judgment as originally entered awarded to the plaintiff a general execution, and also a special execution against the property distrained.

It is conceded that it was irregular to award a general execution against an executrix, and that the judgment should have been made payable in due course of administration, and accordingly on the 7th day of September, A. D. 1877, upon notice to plaintiffs in error, the judgment was amended by striking out the order for a general execution, and inserting in its place an order that the judgment be paid in due course of administration. The order for a special execution against the property distrained, was in no way changed by this amendment.

Giving this amendment thus made, on due notice, all the force which properly belongs to it, in what condition did it leave the judgment? The previous amendment of June 12th,

Bolton v. Board of Education, Dist. No. 3.

1876, being, as we have seen, a nullity, the record showed, notwithstanding that amendment, a judgment against John C. Rauh, and not against his executrix.

The amendment of September 7th, 1877, did not attempt to cure this infirmity in the record, and so the judgment must be still deemed in law to remain in form a judgment against John C. Rauh. But even if it could be held to be a judgment against the executrix, it is still erroneous in awarding special execution against the property distrained. The property seized had been released from the distraint by the execution to the landlord, of the bond provided by statute, and, upon such release, the landlord's specific lien upon the property seized was at an end. It could not, therefore, be taken from the hands of the executrix by special execution, and sold. The only remedies left the landlord were, by enforcing payment of the judgment in due course of administration, or by suit upon his bond. The property seized had become a part of the general assets of the estate, and were not liable to special execution.

For the reason that the judgment must still be regarded as in form a judgment against John C. Rauh, and for the further reason that it awards special execution against the property distrained, it is reversed, and the cause remanded for further proceedings in the Court below, not inconsistent with this opinion.

Reversed and remanded.

JAMES BOLTON

v.

THE BOARD OF EDUCATION, DIST. NO. 3.

1. SCHOOL DISTRICTS—POWER TO ISSUE BONDS—VOTE—HOW DETERMINED.—The right of school directors to issue bonds of their district, is made dependent upon a vote of the people of the district. The question whether there has been an election for that purpose, and a vote in favor of issuing bonds, is left by the Legislature to be determined by the directors of the district, two of whom are required to act as judges, and one as clerk of the

Bolton v. Board of Education, Dist. No. 3.

election, and their determination of the question is final as to all *bona fide* purchasers for value of such bonds.

3. RECITALS IN BONDS—ESTOPPEL.—Where bonds issued by school directors contain recitals that they were issued by virtue of a vote of the district, and according to law, the district is estopped to deny that such vote had been taken, the bonds being in the hands of a *bona fide* holder.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. B. D. MAGRUDER, for appellant; as to recitals in the bonds and rights of innocent holders, cited *Town of Coloma v. Eaves*, 2 Otto, 484; *Marcy v. Township of Oswego*, 2 Otto, 637; *Humboldt Township v. Long*, 2 Otto, 642; *Mary et al. v. Williamson Co. et al.* 72 Ill. 207; *Cairo & St. Louis R. R. Co. v. City of Sparta*, 77 Ill. 505; *Mason et al. v. City of Shawneetown*, 77 Ill. 533.

That the court erred in refusing to admit as evidence the answer of the defendant, filed in a proceeding in chancery to enjoin the collection of a tax levied to pay bonds issued by the defendant: *Robbins v. Butler et al.* 24 Ill. 428.

Mr. H. C. IRISH, Mr. E. M. HAINES and Mr. IRA W. BUELL, for appellee; upon the power of municipal corporations to issue bonds, cited 1 Gross' Stat. 697, § 47; 1 Dillon on Mun. Cor. 524; *School Directors v. Miller*, 54 Ill. 338; *Bissell et al. v. Kankakee*, 64 Ill. 249; *Mayor v. Ray*, 19 Wall. 468; *Marsh v. Fulton Co.* 10 Wall. 676; *Starin v. Genoa*, 23 N. Y. 437.

As to proof of the authority under which the bonds were issued, and recitals as evidence: *School Directors v. Taylor*, 54 Ill. 289; *School Directors v. Sippy*, 54 Ill. 287; *Bissell et al. v. Kankakee*, 64 Ill. 249; *School Directors v. Fogleman*, 76 Ill. 189; *Town of Middleport v. Ætna Ins. Co.* 82 Ill. 562.

That the officers of a corporation cannot by their own act create an estoppel against the corporation: *Bissell et al. v. Kankakee*, 64 Ill. 249; *Ryan v. Lynch*, 68 Ill. 160; *Mayor v. Ray*, 19 Wall. 468; 1 Dillon on Mun. Cor. 524; *Town of South Ottawa v. Perkins*, 9 Chicago Legal News, 290; *County of Dallas v. Mackenzie*, 9 Chicago Legal News, 298; *Clark v.*

Bolton v. Board of Education, Dist. No. 3.

Des Moines, 19 Iowa, 199; Marsh v. Fulton Co. 10 Wall, 676; Chisholm v. City of Montgomery, 2 Woods, 584; Starin v. Genoa, 23 N. Y. 437.

That the bonds in suit were not issued for a corporate purpose: Gross' Stat. 695, § 43; School Directors v. Sippy, 54 Ill. 287.

That a purchaser of municipal bonds is bound to take notice of the extent of the powers exercised by the officers of a municipal corporation: 1 Dillon on Mun. Cor. 464, note.

As to the constitutional prohibition against municipal corporations issuing bonds: Law v. The People ex rel. 10 Chicago Legal News, 171; Constitution of 1870, Art. IX. § 12.

MURPHY, P. J. This was an action of debt, commenced in the Superior Court of Cook county, to the November term, 1875, by the appellant against the appellee, to recover on four bonds issued by the appellee in November, 1870, for the sum of \$500.00 each, for money borrowed, as appears by recitals on the face of the bonds, for the purpose of building a school house in said district. They are made due and payable four years after their dates, respectively, with interest at the rate of ten per cent. per annum, payable annually.

The declaration contains four counts to which the defendant pleaded: first, *non est factum*, sworn to; second, *nil debet*; third, that the bonds were not issued for the purpose of borrowing money to build a school house, etc.; fourth, that said bonds were not issued in pursuance of a majority vote of the legal voters of said School District No. 3, etc.; fifth, that at the date of said bonds, the sum of money already borrowed during said year of 1870, by said district, including previous indebtedness of said district, exceeded five (5) per cent. of the taxable property of said district. To the appellee's 2d, 3d, 4th and 5th pleas, the appellant filed demurrers, which were sustained by the court, and the appellee, abiding by its demurrers as to said pleas, the cause came on for trial upon the plea of *non est factum*, which resulted in a verdict and judgment for the appellees, and the appellant brings the record here, and assigns for error the giving by the court, on its own motion, of an instruc-

Bolton v. Board of Education, Dist. No. 3.

tion: "That the verdict should be for the defendant," and that the court erred in requiring the plaintiff to prove an election before admitting the bonds in evidence. There are other errors assigned; but it will be unnecessary for us to consider them.

The declaration alleges that the defendant is the successor-in-law of the school directors of district No. 3, township No. 37, county of Cook and State of Illinois, who issued the bonds counted upon; that on or about the first Monday of April, 1873, the defendant became and was duly organized as a body corporate and politic, by a vote of the legal voters of said district, under the name of the Board of Education of District No. 3, Township 37, county of Cook and State of Illinois, and thereby became liable for the payment of these bonds.

It appears that these bonds were issued by the directors of this district, for the purpose of borrowing money to aid in the construction of a school house in that district, and that the appellant is a *bona fide* purchaser for value.

The bonds involved were issued under and by virtue of Section 47 of Chapter 98, of Gross' Statutes of this State, which is as follows: "For the purpose of building school houses or purchasing school sites, or for repairing and improving the same, the directors, by a vote of the people, may borrow money, issuing bonds, executed by the officers, or at least two members of the board, in sums of not less than \$100.00, but the rate of interest shall not exceed ten (10) per cent., nor shall the sum borrowed in any one year for building school houses, exceed three per cent. of said taxable property." By which it will be seen that a vote of the people in favor of such action, is necessary as a condition precedent to the exercise of such power by the officers of such district.

By the provisions of section 42, of the same chapter, the mode of taking a vote of the people is provided for, and directing how it shall be conducted, and by whom, in the following terms: "Notice of all elections in organized districts shall be given by the directors at least ten days previous to the said election. Said notices shall be posted in at least three (3) of

the most public places in the district, and shall specify the place where such election is held, the time of opening and closing the polls, and the question or questions to be voted on. Two of the directors shall act as judges, and one as clerk of said election. * * * The directors shall appoint one of their number as clerk, who shall keep a record of all the official acts of the board in a well bound book provided for the purpose, which record shall be submitted to the township treasurer for his inspection and approval on the first Mondays of April and October, and at such other time as the township treasurer may require." From the provisions of the statute it is apparent for what purpose and under what circumstances the directors of the school districts may issue bonds, borrow money, and incur a valid liability against the district they represent. It is only for the specified objects of building school houses or purchasing school sites, or repairing and improving the same, that this power can be exercised at all, and then only by the consent and direction of the legal voters of the district (formally expressed), at an election for that purpose, called and conducted by the directors, as required by the statute. It is to be observed that the question is between the district and a person claiming through the action of its agents as a *bona fide* purchaser, for value of commercial paper issued and put in circulation by them, and taken in the market by appellant upon the faith of their apparent authority.

From the foregoing statute it is obvious that the right to issue the bonds by the directors was made dependent upon a vote of the people of the district whether they would borrow money for the purpose therein expressed, and the first question is, how is it to be ascertained, whether these conditions have been complied with; whether, indeed, there has been any election held for such purpose as required by law; and if so, whether a majority of the votes cast at such election were in favor of the issue of these bonds in controversy.

These are questions which must be settled and determined by the officers who by the law are required to perform these acts, and to whose judgment and determination they are submitted by law. It is important to know when these facts are

Bolton v. Board of Education, Dist. No. 3.

to be ascertained, whether before or at the time of their issue, or after, and whether they must be ascertained every time payment is demanded either of principal or interest on such bonds. It is plain that the Legislature intended to vest the power to determine these questions somewhere, and authorize somebody to settle and determine them, and when once determined, to be a final determination of the question as to all *bona fide* purchasers for value.

The only persons spoken of in the act as having anything to do in posting the required notices and conducting the election, are the directors of the district, two of whom are required to act as judges, and one as clerk of said election. Thus it will be seen that any official authentication of said election and the result thereof, must be under the hands of the directors. It is urged by the appellee that the appellant dealt at his peril with the appellee, for the reason that it is a municipal corporation, and that the rule of law is, that in dealing with them, parties must see to it for themselves that all the steps required by the law as a condition to their exercise of power, have been taken, and that if they have not, he must suffer the consequences.

The dishonesty of this defense is conspicuous, when we remember that the appellee continues to retain the money or consideration for which these bonds were issued, it being conceded that they received full consideration for them, and continue to hold and enjoy the same, while, by self-stultification, they are delaying the payment of an unquestionably just debt. It is the right and duty of the public to know the law which governs and controls the appellee, existing, as it does, alone by virtue of express law. By reference to the law the public learn and know the officers whose duty it is to call and superintend the election, and declare the result thereof; therefore, upon the legal presumption that these officers have done their duty when they say they have, the public have a right to rely.

It is undoubtedly the duty of parties dealing with such a corporation to make inquiry into the fact of whether or not the necessary steps required by the statute have been taken, and

that too of the proper parties, who are in possession of the official knowledge of such facts.

Under the provisions of this statute, we think it was the obvious intention of the Legislature to commit that question to the board of directors, and that it is made their official duty to know and declare the result of such election to the public; and when they have enquired and received the answer of such board, that all the steps required by the statute have been taken, they have a right to act upon it. They have a right to presume that the directors are speaking truthfully in making representations for the purpose of obtaining credit, which in this case they did. Printing these representations in the bonds so issued, they, upon principle, should now be estopped to deny their truth, thus taking advantage of their own wrong. In this case the appellee issued four bonds of \$500.00 each, due four years after the date thereof, with interest at the rate of ten (10) per cent. per annum, one differing only in date from the other three, in the following form:

“\$500.00. [No. 1.] BOND [No. 1.] \$500.00
OF THE

“SCHOOL DIRECTORS OF DISTRICT No. 3,

“TOWNSHIP 37, NORTH OF RANGE 11, EAST OF THE 3D P. M.

“Know all men by these presents, That the ‘School
“ ‘Directors of District No. 3, Township No. 37, County
“ ‘of Cook and State of Illinois,’ are indebted unto A.
“ H. Andrews & Co. in the sum of Five Hundred Dol-
“ lars, for money borrowed for the purpose of building
“ a school-house, according to the instructions of the vo-
“ ters of said District, expressed by a vote as prescribed
“ by an act of the Legislature of the State of Illinois,
“ entitled ‘An Act to amend the School Law,’ approved
“ February 16, 1865, by virtue of which act this Bond is
“ issued. The said sum of money to be paid to the said
“ A. H. Andrews & Co., or order, on the 2d day of No-
“ vember, A. D. 1874, with interest from the date hereof,
“ at the rate of ten per cent. per annum, interest to be
“ paid annually. Principal and interest payable at the
“ office of the County Treasurer of said county.

SCHOOL DISTRICT NO. 3.

LEMONT, ILLINOIS.

Bolton v. Board of Education, Dist. No. 3.

“ In witness whereof, we, the School Directors of said
“ District, have hereunto set our hands and seals, this 2d
“ day of November, A. D. 1870.

“STEPHEN KEOUGH, [SEAL.]

“ALFRED ROEBUCK, [SEAL.]

“PETER TALTY,” [SEAL.]

“ Directors of said District.”

“ Signed and sealed by Stephen Keough, Peter Talty,
“ and Alfred Roebuck, School Directors of said District
“ No. 3, in presence of

D. C. SKELLY,

[NOTARIAL SEAL.]

Notary Public.”

Thus it is seen that the directors over their own hand and seal, issued their bond, acknowledging, in the most solemn manner, that they have received the \$500.00 in money, in behalf of said appellee, and that they have taken the vote of the people upon that question, and declared the result in favor of issuing the same, and, continuing to hold said money, they come here and defend on the ground that they did not cause all said steps to be taken before issuing said bonds.

In the case of Town of Coloma v. Eaves, 2 Otto, 593, the court, having the same question under consideration, say: “If, when the law requires a vote of tax-payers, before bonds can be issued, the supervisor of a township, or the judge of a probate of a county, or other officer or magistrate, is the officer designated to ascertain whether such vote has been given, and is also the proper officer to execute, and who does execute the bonds, and if the bonds themselves contain a statement or recital that such vote has been given, then the *bona fide* purchaser of bonds need go back no further. He has a right to rely upon the statement as a determination of the question.”

In the case of County of Warren v. Marcey, decided May 6th, 1878, the U. S. Supreme Court say: “That the bonds issued to aid in the construction of a railroad, appearing on their face to be regular and in accordance with law, the innocent purchaser from the county is protected, notwithstanding the alleged defect in the notice of an election, ordered to be taken upon their issue, * * * and that from this dilemma there is no

escape, unless the privilege of commercial paper be abrogated, and it is made the duty of those who take it, to inquire into all of its previous history, and the circumstances of its origin, and this would be to revolutionize the principles on which the business of the commercial world is transacted, and would require a new departure in the modes and usages of trade."

It will be seen that, by the holding of the U. S. Supreme Court, the recitals on the face of these bonds are conclusive evidence in favor of *bona fide* holders; that all the necessary steps required by the statute has been taken before their issue. In the case of Maxcy et al. v. Williamson Co. et al. 72 Ill. 209, our own Supreme Court, in discussing this question in respect to bonds issued by Williamson County, use the following significant language:

"The bonds having been issued and got into circulation, all reasonable presumptions must be indulged in favor of their regularity, until overcome and rebutted; and even if irregularities are shown, they will not invalidate the bonds, unless they go to the power of the County Court to issue them. It must be presumed, when such bonds are found in circulation, that the legal steps have been taken to authorize their issue. It may, no doubt, be shown that there was a want of compliance with the essential requirements of the law, but until shown we must presume that the officers have performed their duty, and the bonds were regularly issued, and are valid."

In that case, the bonds, in respect to which the court uses the foregoing language, contained no recitals, that all antecedent, essential requirements of the law had been complied with by the parties whose duty, under the law, it was to perform them, and also issue the bonds, as the bonds in this case do, and the court holds, that they, being found in circulation, and in the hands of a *bona fide* holder, must be held to be regularly issued and valid, until the contrary is made to appear. Even if fraud be shown in the issue of the bonds, it would not be effectual against a *bona fide* purchaser for value.

In the case at bar, the bonds, containing the recitals they do, bring them clearly within the rulings of the Supreme Court of the United States. In the absence of a holding on

Evans v. Gage et al.

that question by our own Supreme Court in a case involving bonds, containing recitals in the bonds, that the requirements of the Legislative Act have been complied with, we feel warranted in adopting the holdings of the United States Supreme Court, particularly so when they rest on reasons so apparently unanswerable, as they do in this case.

We are, therefore, of opinion that the bonds in the hands of a *bona fide* holder, containing the recitals they do, conclusively establish a liability against the appellee: *The Cairo & St. Louis R. R. Co. v. The City of Sparta*, 77 Ills. 505; *Mason et al. v. City of Shawneetown*, 77 Id. 533; *Marcy v. Township of Oswego*, 2 Otto, 637. In the light of these views, we think the court below erred in holding that the appellant must prove that the essential requirements of the statute had been complied with by the appellee before the issue of the bonds in question, and in instructing the jury that their verdict should be for the defendant.

For these errors the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

MICHAEL EVANS, Collector, etc.

v.

SETH GAGE ET AL.

1. REVENUE—BILL TO RESTRAIN COLLECTION OF A TAX—WHEN ALLOWED.—A bill in equity to restrain the collection of a tax will not be sustained, except in cases where the tax is unauthorized by law, or where it is assessed upon property not subject to taxation, or where the property has been fraudulently assessed at too high a rate.

2. EXCESSIVE VALUATION—FRAUD.—Excessive valuation alone is not sufficient to warrant the interference of a court of equity to restrain the collection of a tax. In the absence of fraud the valuation fixed by the officers charged by law with the duty of making the assessment, is final, and cannot be reviewed by the courts.

3. DUTY OF ASSESSOR—FAILURE TO CALL FOR A SCHEDULE.—Had the assessor entirely failed to call upon appellees for a list of their taxable property, and based his estimate upon information otherwise obtained, such omis-

Evans v. Gage et al.

sion on his part would have been an irregularity only, and would afford no ground for restraining the collection of the tax.

4. APPLICATION TO TOWNSHIP BOARD—DUTY OF TAX-PAYER.—The law provides an adequate remedy against excessive taxation by application to the township or county board to have the same reduced, and it is the duty of the tax-payer feeling himself aggrieved by an assessment to apply there for relief. No notice to him that an assessment of his property has been made is necessary. Every owner of personal property is deemed to know that the same is liable for taxation; the law fixes the time of the meeting of the township board for hearing objections to assessments, of which he is bound to take notice, and it is incumbent upon him, if he would insure protection against an excessive assessment, to make due inquiry, and if an assessment has been made of his property, to appear before the proper board, and ask for a review.

APPEAL from the Superior Court of Cook county; the Hon. SAMUEL M. MOORE, Judge, presiding.

Mr. JOSEPH F. BONFIELD for appellant; upon the question of jurisdiction of a court of equity to restrain the collection of a tax, cited *Republic Life Ins. Co. v. Pollak*, 75 Ill. 292; *C. B. & Q. R. R. Co. v. Cole et al.* 75 Ill. 591; *Spencer et al. v. The People*, 68 Ill. 510; *Swinney et al. v. Beard et al.* 71 Ill. 27; *Deming et al. v. James*, 72 Ill. 78; *Adsit v. Lieb*, 76 Ill. 198; *Porter et al. v. R. R. I. & St. L. R. R. Co.* 76 Ill. 561; *Nunda v. Crystal Lake*, 79 Ill. 311; *Beers v. The People et al.* 83 Ill. 488.

That a party has an adequate remedy at law for the recovery of a tax illegally paid: *Du Page County v. Jenks*, 65 Ill. 275.

That a court of equity will not interfere to restrain the collection of a tax on the ground of an excessive assessment: *Cooley on Taxation*, 528; *C. B. & Q. R. R. Co. v. Frary et al.* 22 Ill. 34; *Cook County v. C. B. & Q. R. R. Co.* 35 Ill. 460.

Mr. E. G. ASAY and Mr. W. L. HIRST, for appellee; contending that where the assessment has greatly exceeded the actual value of the property, the court has always enjoined the collection of the tax, cited *Drake v. Phillips*, 40 Ill. 388; *Board of Supervisors v. Campbell*, 42 Ill. 490; *Cleghorne v. Postlewaite*, 43 Ill. 428; *Elliott v. Chicago*, 48 Ill. 293; *Darling v. Gunn*, 50 Ill. 424; *Du Page v. Jenks*, 65 Ill. 275; *Spencer et al.*

Evans v. Gage et al.

v. The People, 68 Ill. 510; Porter v. R. R. I. & St. L. R. R. Co. 76 Ill. 561.

BAILEY, J. On the 10th day of February, 1876, appellees filed their bill in the Superior Court against appellant, as collector of the town of South Chicago, for an injunction to restrain the collection of a portion of the tax levied upon the personal property of appellees for the year 1875.

The bill alleges, in substance, that on the 1st of May, 1875, appellees were carrying on the millinery business in the town of South Chicago, with a stock of a fair cash value of \$30,000, and no more; that about that day the assessor of said town, in person or by deputy, called at appellee's place of business in their absence, and inquired of one John N. Gage, who happened to be there, the value of appellee's stock of goods, and other personal property, and without requiring any schedule or list from appellees, or from any one authorized by them to make one, wrongfully, arbitrarily, fraudulently, and without notice to, or assent or knowledge of appellees, assessed said stock and personal property at \$80,000; that said John N. Gage had no authority to give said assessor any information as to the value of said property, and in fact had no knowledge in relation to such value, and so informed said assessor; that neither said assessor, nor any of his deputies, called on appellees, or requested them to list their personal property, or left at their place of business, or elsewhere, any notice requiring them so to do; and that they had no knowledge that the assessor had sought or received any information from said John N. Gage, or any one else in regard to the value of said property until the early part of December, 1875.

The bill further avers that the assessment of personal property in said town for the year 1875, was grossly fraudulent and illegal, and that it was disproportionately made—some persons and corporations not being assessed at all, and others being assessed much too low, and that by reason of such discrimination, appellees will be greatly and irreparably injured; that the State Board of Equalization afterwards, wrongfully, arbitrarily, fraudulently and without notice to appellees, raised the

Evans v. Gage et al.

valuation of appellees' said personal property to \$121,600, upon which valuation a tax of \$5,094 was extended; that appellant, as collector of said town, threatens to levy upon appellee's personal property, unless immediate payment of said tax be made; that said assessor and collector are wholly irresponsible to respond to appellees in damages, in case said tax, after being collected, is declared void.

Appellees, in their bill, offer to pay a tax, properly extended, upon a valuation of \$30,000, to wit: \$1,255.70, and ask for a reference to the Master to determine how much of said tax was legal and how much illegal.

Appellant answered, without oath, denying the various allegations of fraud in said bill, and averring in substance that appellees' personal property in said town, on the first of May, 1875, subject to taxation, exceeded \$80,000; that appellees were duly notified by the town assessor to make a schedule of their taxable property as required by law; that appellees did make a return, showing the value of their personal property to be \$80,000; that the assessor, in conformity with such return, assessed their property at that sum, and that such assessment was just and reasonable.

The answer admits that the valuation of all personal property in Cook county, in 1875, was increased by the State Board of Equalization 52 per cent., and insists that such action of the State Board was just and legal, and for the purpose of effecting a proper equalization.

The answer further avers that appellees, since the filing of their bill, had voluntarily paid appellant, as a part of said taxes, the sum of \$1,910.20.

To this answer a replication was filed, and the cause afterwards came on to be heard upon bill, answer, replication and proofs. At the hearing, Seth Gage, one of the appellees, testified that on the first of May, 1875, the personal property of his firm was worth \$30,000. That was what they considered it worth for them to go along with the business. The first cost of all the goods in the store at that time was about \$35,000. The fixtures were worth \$1,000. There were accounts due the firm of from \$160,000 to \$180,000, and the firm were

Evans v. Gage et al.

owing from \$160,000 to \$170,000. If either way, they were owing more than was coming to them. At that time they had in bank \$297.39. He did not see any schedule left at his place, and did not see one made out; but an unauthorized schedule was made out by his brother, John N. Gage, fixing the valuation at \$80,000. This brother made his headquarters at appellees' store, but was not, and for a year and a half had not been, a member of the firm, had no interest in its affairs, was unacquainted with its merchandise, and unauthorized to make such schedule.

Charles Curley, the chief clerk in the office of the assessor of South Chicago, testified to having seen in said office a return signed "Gage Brothers & Co.," fixing the valuation of the property of the firm at \$80,000. It was admitted that this paper had been destroyed, and a copy thereof made by this witness was produced and identified.

Upon these proofs the court below rendered its decree, finding "that the valuation of the personal property of the complainants for the year 1875, for the purposes of taxation, as valued and made by the town assessor of the said town of South Chicago, was excessive, and that the taxes extended on such valuation, were also excessive," and decreeing that, upon payment by appellees of the sum of \$382.26, in addition to that already paid, the residue of said taxes be perpetually enjoined.

The law is well settled in this State that a Court of Equity will never sustain a bill to restrain the collection of a tax, excepting in cases where the tax is unauthorized by law, or where it is assessed upon property not subject to taxation, or where the property has been fraudulently assessed at too high a rate. *C. B. & Q. R. R. Co. v. Cole et al.* 75 Ill. 591; *Swinney et al. v. Beard et al.* 71 Id. 27; *Porter et al. v. R. R. I. & St. L. R. Co.* 76 Id. 561; *Village of Nunda v. Village of Chrystal Lake*, 79 Id. 311; *Cook County v. C. B. & Q. R. R. Co.* 35 Id. 460. Neither the mere illegality of the tax complained of, nor its injustice or irregularity of themselves, give the right to an injunction in a Court of Equity. *State Railroad Tax Cases*, 2 Otto, 575, 613.

There can be little doubt, under the evidence, that the as-

assessment of appellee's property was excessive, and the court below, in finding that fact in the decree, was fully sustained by the proofs. But such excessive valuation alone did not warrant the interference of equity to restrain the collection of the tax based thereon. In the absence of fraud, the valuation fixed by the officers charged by law with the duty of assessing property for purposes of taxation, must be deemed to be final, and the courts have no power to review the same or change the valuation so fixed. The various officers and boards charged with the duty of fixing the value of property for purposes of taxation, act judicially, and their decisions can only be impeached for fraud. Upon this principle it has been frequently held by the Supreme Court that Courts of Equity cannot relieve against an excessive valuation unless it appears that the officers making the same have acted fraudulently. *Adsit v. Lieb et al.* 76 Ill. 198; *Porter et al. v. R. R. I. & St. L. R. R. Co.* Id. 561; *Republic Life Ins. Co. v. Pollak et al.* 75 Id. 292; *C. B. & Q. R. R. Co. v. Cole* Id. 591; *Spencer et al. v. The people*, 68 Id. 510.

While fraud is charged in the bill, it is denied in the answer, and we fail to find any proof in the record sustaining the charge. Nor does the decree recite that any fraud was found by the court below. The most that can be said is, that through misinformation or error of judgment, the assessor valued appellees' property at a sum considerably in excess of its actual cash value. The proofs give us no intimation that he acted dishonestly or with any design of placing the valuation of this property disproportionately high. There is evidence tending to show that the assessor, or his deputy, called at appellees' place of business with a view to obtaining a valuation of their property, and not finding appellees there, obtained a schedule from a brother of the senior member of the firm, who had previously been a partner in the firm, fixing the value of the property at \$80,000. We cannot see why the officer making the assessment may not in all this have acted in perfect good faith and upon an honest belief that this schedule stated the value fairly and justly.

Even if we felt bound to hold that the party making this

Evans v. Gage et al.

schedule acted wholly without authority, and that the schedule must consequently be regarded as a mere nullity and no sufficient basis for the valuation, we cannot see how the case is in any different plight from what it would have been had the assessor entirely failed to call on appellees for a list of their taxable property, and based his estimate upon information otherwise obtained. His omission to call for such list would have been an irregularity only, and would afford no ground for restraining the collection of the tax. *Board of Supervisors of DuPage County v. Jenks et al.* 65 Ill. 275.

The law furnishes an adequate remedy against an excessive valuation, by application to the township board, or to the county board, to have the same reduced. By section 86 of the Revenue law, the town board meets on the fourth Monday in June of each year, for the purpose of reviewing the assessment of property in the town, and on application of any party considering himself aggrieved, they are required to review the assessment and correct the same, as shall appear to them just. Also, by section 97 of the act, the county board meets on the second Monday in July, and they, too, on application of any person considering himself aggrieved, are required to review the assessment, and correct the same, as shall appear to be just. Appellees might have appeared before either of these tribunals, and upon a proper showing, the excessive valuation of their property would doubtless have been corrected. They appear however to have made no effort to obtain relief under these sections, and having thus neglected to avail themselves of the remedy provided by law, they cannot now have relief in a court of equity. *Adsit v. Lieb et al. supra.*

But it is insisted that appellees had no notice of this excessive valuation until a long time after the town and county boards had held their sessions and adjourned, and that consequently they were guilty of no laches in failing to apply to those boards for relief. In this view we are unable to concur.

Appellees must be deemed to have known that their personal property was liable to valuation and assessment for purposes of taxation, and that if, for any cause, the assessor failed to obtain from them a statement of their personal property, it was

Kimball et al. v. Corn Exchange National Bank.

his duty to ascertain from other sources the amount and value thereof, and assess the same accordingly. Had they delivered to the assessor a schedule showing a fair valuation of their property, they might, perhaps, have properly relied upon the presumption that such valuation would not be changed without notice to them, and thus be excused from the duty of giving the subject any further attention. But they had no right to suppose that because they gave him no schedule of their property, it would not be assessed at all. On the other hand, they were bound to know that an assessment of some kind would be made, and being necessarily in ignorance of the valuation made by the assessor, it was incumbent on them to ascertain the amount at or before the time of the meeting of the town or county board, so as to avail themselves of the relief provided by the statute. The time of the meeting of these boards is fixed by law, and appellees were bound to take notice of it. The very fact that they did not know the valuation the assessor had placed on their property, should have put them on inquiry, and they should have taken pains to ascertain the action of the assessor. Having failed so to do in time to obtain relief in the manner pointed out by the statute, they cannot now complain of the excessive assessment.

We think the court below erred in granting the relief prayed for in the bill, and the decree will therefore be reversed, and the bill dismissed for want of equity.

Decree reversed and bill dismissed.

MARK KIMBALL ET AL.

v.

THE CORN EXCHANGE NATIONAL BANK.

1. REVENUE—INCREASE OF ASSESSMENT BY COUNTY BOARD.—The addition by the county board to the valuation of personal property in one town, without a corresponding reduction in the valuation in other towns, thereby increasing the aggregate valuation beyond what was actually necessary and incidental to a proper and just equalization, is without authority of law and void.

Kimball et al. v. Corn Exchange National Bank.

2. **PAYMENT OF ILLEGAL TAX—DURESS.**—The payment of a tax levied under an illegal assessment, while the warrant for its collection is in the hands of the collector, and with a view of avoiding a threatened levy and sale, cannot be deemed a voluntary payment, but made under such duress as will entitle the tax-payer to recover it back.

3. **ACTION TO RECOVER TAX PAID.**—In order to recover an illegal tax paid under duress, resort must be had to a suit at law. A recovery cannot be had by a proceeding in equity to restrain the collector from paying over such tax.

4. **BILL IN EQUITY—MULTIPLICITY OF SUITS.**—In this case the tax was paid by a bank upon its capital stock owned by individual stockholders, and it was insisted that a bill in chancery would lie, to prevent a multiplicity of suits. *Held*, that all moneys paid by the bank in excess of the legal tax cannot be said to have been paid for the stockholders, but were moneys of the bank, and could be recovered in the corporate name of the bank; that it being an illegal tax, the bank could not set up its payment for taxes as a defense against the demands of the shareholders for their dividends.

5. **COLLECTOR PAYING OVER AFTER NOTICE.**—The bank having given the collector notice of its rights in relation to the money in dispute, and demanded of him re-payment, he cannot, by paying over the money according to the terms of his warrant, escape his liability to an action on the part of the bank to recover the same back.

APPEAL from the Superior Court of Cook county; the Hon. S. M. MOORE, Judge, presiding.

Mr. M. R. M. WALLACE and Mr. JOSEPH F. BONFIELD, for appellants; that a writ of injunction is never employed to give affirmative relief, cited *Menard v. Hood*, 68 Ill. 121; *Brush v. Carbondale*, 78 Ill. 74.

That a court will not enjoin the collection of a tax unless the property is exempt from taxation, or where not authorized by law: *Munson v. Miller*, 66 Ill. 380; *Adsit v. Lieb et al.* 76 Ill. 198; *Rep. Life Ins. Co. v. Pollak*, 75 Ill. 292; *Porter et al. v. R. R. I. & St. Louis R. R. Co.* 76 Ill. 561; *Cook Co. v. C. B. & Q. R. R. Co.* 35 Ill. 460; *Dows v. City of Chicago*, 11 Wall. 108.

A tax having been paid, the only remedy is by action at law for its recovery: *People v. Miner*, 46 Ill. 374; *Beckwith v. English*, 51 Ill. 148; *Board of Supervisors v. Manny*, 56 Ill. 160; *Union Bld'g Ass'n v. Chicago*, 61 Ill. 447; *McDaniel v. Fox*, 77 Ill. 343; *Feiman v. Galesburg*, 48 Ill. 485; *Cooley on Taxation*, 546.

Kimball et al. v. Corn Exchange National Bank.

The payment of the tax being voluntary, it cannot be recovered back, even though it be declared illegal: Cooley on Taxation, 566; People v. Miner, 46 Ill. 384; Union Bld'g Ass'n v. Chicago, 61 Ill. 439; Bd. Supervisors v. Manny, 56 Ill. 160.

Messrs. HITCHCOCK, DUPEE & JUDAH, for appellee, contended that the county board had no jurisdiction to increase the aggregate valuation of all the towns, and cited Rev. Stat. 873, § 97; Rev. Stat. 875 § 105; Buck v. The People, 78 Ill. 560; Mix v. The People, 72 Ill. 241.

That an illegal tax paid to prevent a threatened levy and distraint, is not voluntarily paid: Cooley on Taxation, 569; Bradford v. The City, 25 Ill. 411; Falls v. City of Cairo, 58 Ill. 403; Preston v. City of Boston, 12 Pick. 7; Lincoln v. City of Worcester, 8 Cush. 60; Atwell v. Zuluff, 26 Mich. 119; First Nat. Bank v. Watkins, 21 Mich. 483.

That a bill in chancery may be maintained to enjoin payment of tax, and compel re-payment if it has been made: Cumberland Co. v. Webster, 53 Ill. 141; Du Page Co. v. Jenks, 65 Ill. 275; Cleghorn v. Postlewait, 43 Ill. 428; Darling v. Gunn, 50 Ill. 424; McConkey v. Smith, 73 Ill. 313.

In this case a bill in chancery is maintainable, to prevent multiplicity of suits: 2 Story's Eq. § 854; High on Injunctions, § 12; Cooley on Taxation, 545; Kerr on Injunctions, § 49; Holmes v. Baker, 16 Gray, 261; Kerr v. City of Lansing, 17 Mich. 37; Harward v. St. Clair Drain Co. 51 Ill. 130; Upington v. Oviatt, 24 Ohio St. 245; Harr v. Denniston, 19 N. H. 170.

That the collector, unless restrained, must pay over the tax according to his warrant, and no action could be maintained against him: Rev. Stat. 885, § 165; Cooley on Taxation, 560; Hill v. Figley, 25 Ill. 156; Norwell v. Tripp, 61 Me. 426; Abbott v. Tort, 2 Denio, 86; Moore v. City, 18 Pa. St. 55; Erskine v. Hohenback, 14 Wall. 613; Sheldon v. Van Boskirk, 2 N. Y. 473; Upton v. Holden, 5 Met. 360; Stetson v. Kempton, 13 Mass. 283.

BAILEY, J. On the 18th of March, 1878, the Corn Ex-

Kimball et al. v. Corn Exchange National Bank.

change National Bank of Chicago, filed in the Court below its bill in chancery on its own behalf, as well as on behalf of its shareholders, against Mark Kimball, in his own proper person, and as collector of the town of South Chicago, Samuel H. McCrea, collector of Cook County, Charles R. Larrabee, treasurer of the city of Chicago, and J. Irving Pierce, treasurer of the Board of South Park Commissioners, to restrain said Kimball from paying over to the other defendants one-sixth of the taxes levied upon the shares of the capital stock of the complainant for the year 1877, and to recover the same back from said Kimball.

The bill alleges that the complainant is a duly organized National Bank, located in the town of South Chicago, having a capital of \$500,000, divided into 5,000 shares of \$100 each; that on the 1st of May, 1877, the town assessor of South Chicago assessed said capital stock for the purposes of taxation for the year 1877, at the aggregate sum of \$170,000, the same being a fair valuation as other property in the county was assessed; that such valuation, without modification by the assessor or the town board, was returned to the county clerk; that an abstract of the assessments of the several town assessors of Cook county, including the assessment of said capital stock, was, on the 10th of August, 1877, certified by the county clerk to the auditor of public accounts, and by him laid before the State Board of Equalization at its meeting in August, 1877; that on the 20th of August, 1877, the county board of Cook county met for the purpose of equalizing the assessments of property between the several towns, and that said county board, without making any corresponding reductions in the valuation of the personal property or of the aggregate property of the other towns, added 20 per cent. to the valuation of the personal property in the town of South Chicago, as made by the town assessor, thereby increasing the valuation of complainant's capital stock to \$204,000; that by the addition of said 20 per cent. the valuation of personal property in South Chicago was increased from \$11,910,504.25 to \$14,292,610, and the aggregate valuation of personal property in Cook county from \$19,322,980 to \$21,905,382.

Kimball et al. v. Corn Exchange National Bank.

The bill further alleges that the county clerk thereupon certified to the auditor another abstract, showing the addition of said 20 per cent., which was also laid before the State Board, but that the State Board ignoring said 20 per cent., equalized the value of the property of Cook county upon the basis of the valuation shown by the first abstract, and upon that basis added to the valuation of the personal property of Cook county 57 per cent., and other rates on other classes of property; that the auditor certified to the county clerk these additions made by the State Board, and directed said clerk to extend the taxes for the year 1877 against the property of said county accordingly, but that the clerk, in extending the taxes of South Chicago, first added to the personal property said 20 per cent., and then to the sum thereby obtained added said 57 per cent., thereby increasing the valuation of complainants' capital stock to the sum of \$320,280, and on the valuation thus obtained extended the State, county, city and South Park taxes, thus making the aggregate of the taxes levied upon the shares of complainants' capital stock \$13,541.55.

It is insisted in the bill that this 20 per cent. added to the valuation of the capital stock of the bank, was without authority of law, and that consequently the taxes levied upon such increased valuation, being $16\frac{2}{3}$ per cent., or one-sixth of the total tax, was illegal and void.

It is further alleged, that for the collection of the taxes extended as aforesaid, warrants were duly made out and delivered to said Mark Kimball, collector of the town of South Chicago, and that he, upon being armed with such warrants, gave public and private notice that such taxes must be paid at once, and that in default of payment he would levy and make the same by distress and sale; that said bank, being ignorant of said illegality in the assessment, and to save itself from levy and distress of its property and sale of its shares of stock, paid to the collector the full amount of the tax; that one-sixth of the money so paid should be held to be money had and received by Kimball for the use of the bank; and that it had given notice and demanded of him re-payment of the same, which he had refused, on the ground that the proper authorities entitled

Kimball et al. v. Corn Exchange National Bank.

thereto, as appeared from his warrant, had claimed that said money should be paid to them, and that said Kimball, unless restrained from so doing, would, under fear of civil or criminal liability, or both, pay over said money to said authorities.

To this bill the defendants filed a general demurrer, which being overruled by the court, the defendants elected to stand by their demurrer, whereupon a decree was entered perpetually enjoining said Kimball from paying over said one-sixth of said taxes to any person or persons, corporation or corporations, and perpetually enjoining the other defendants from collecting or receiving, or attempting to collect or receive, the same; and decreeing that said Kimball repay the said bank said one-sixth of said taxes, amounting to \$2,256.92, as prayed for in said bill.

In the case of Kimball, collector, etc. v. The Merchants Savings Loan and Trust Co., decided at the present term, we have fully considered the question of the validity of so much of the taxes upon the personal property of the town of South Chicago, for the year 1877, as was levied upon the addition of 20 per cent. made by the county board to the valuation of said personal property, and have held the same to be illegal and void. In that case a bill was filed in the court below, setting up the same matters in relation to the addition by the county board of said 20 per cent. to the valuation of said personal property alleged in the bill now before us, and praying for an injunction to restrain the collection of certain taxes then unpaid, based on such 20 per cent. addition. The court below granted the prayer of the bill, and the record having been brought here by appeal, we affirmed the decree, it appearing to us that the county board in adding 20 per cent. to the valuation of said personal property, without making any corresponding deductions, thereby increasing the aggregate valuation beyond what was "actually necessary and incidental to a proper and just equalization," acted clearly and manifestly without authority of law.

In this case, the complainant having paid this tax, while the warrant for its collection was in the hands of the collector, and with a view of avoiding a threatened levy upon and sale of the shares of its capital stock belonging to its stockholders, such

payment cannot be deemed to have been voluntary, but was made under such degree of duress as will entitle the tax-payer to recover the same back: *Bradford v. The City of Chicago*, 75 Ill. 411; *Falls v. The City of Cairo*, 58 Id. 406.

In our opinion, however, in order to recover back these taxes, resort should have been had to an action at law, and not to a bill in chancery. The principle is too elementary to require discussion or illustration, that where a party has an adequate remedy at law, equity will afford him no relief. Here the complaint is, that the town collector has obtained possession of certain moneys which *ex æquo et bono*, belong to the bank. The proper remedy in such case, is the common law action for money had and received: *Board of Supervisors of Stephenson County v. Manny*, 56 Ill. 160. This action would have afforded the tax-payer an adequate and complete remedy, and we see no ground for an appeal to equity jurisdiction.

But while the general proposition that money paid under duress for taxes illegally assessed, may be recovered back in an action for money had and received, seems to be undisputed, it is insisted by counsel for appellee that, under the peculiar circumstances of this case, the aid of a court of equity may be invoked to prevent a multiplicity of suits.

It is claimed on the one hand, that unless the town collector is restrained by injunction from so doing, he will pay these moneys over to the several municipal corporations on whose behalf they were assessed and collected, so as to necessitate a suit at law against each one of these corporations separately. On the other hand, it is insisted that the bank, in paying these taxes, acted merely as the trustee or agent of its stockholders, and that the legal title to the moneys in question is in the stockholders and not in the bank, so as to necessitate separate actions at law on behalf of each stockholder for the recovery of his separate proportion of the same.

Without attempting to define the cases in which equity may interpose to prevent a multiplicity of suits, we think no such case exists here. Appellee having, as the bill avers, given notice to the town collector of its rights in relation to the money in dispute, and demanded of him re-payment thereof,

Kimball et al. v. Corn Exchange National Bank.

the collector cannot now, by paying the money over according to the terms of his warrant, escape his liability to an action on behalf of appellee to recover the same back.

It being money in his hands to which the various municipal bodies mentioned in his warrant have no right, and which equitably belongs to appellee and not to them, it is the legal duty of the collector to repay it to appellee, and a payment to the several municipal treasurers, after notice and demand by appellee, would not discharge him from his liability to perform that duty.

And we further think that a judgment in favor of appellee against the collector for these moneys duly satisfied, would be, *pro tanto*, a defense to any suit upon the official bond of the collector.

We are unable to see that any multiplicity of defendants would grow out of appellee's being compelled to seek his remedy at law.

Nor do we think any multiplicity of plaintiffs would result from the peculiar relations existing between the bank and its shareholders. It is true, that under the provisions of the revenue law the taxes upon the shares of stock in state and national banks are assessed against the stockholders and not against the bank, and that for the purpose of collecting such taxes it is made the duty of the bank or its officers to retain so much of any dividend or dividends belonging to the stockholders as shall be necessary to pay any taxes levied upon their shares of stock, respectively, until it is made to appear that such taxes are paid.

The bill alleges that it was customary for appellee and other national banks in this state, to pay all taxes legally levied against the shares of stock of the stockholders, and that to that extent the bank was the trustee of its stockholder.

If the moneys in controversy were really the moneys of the stockholders and not of the bank, and the bank was merely their agent to pay them over to the collector of taxes, we cannot see upon what principle a suit in equity, even, to recover them back, brought in the name of the bank, can be sustained.

The same rights to the money which can be made the basis of a bill in equity, will also support the equitable action for money had and received, and if such action could not be sustained on behalf of the bank, neither can this bill.

But admitting that the bank was a mere trustee, for its stockholders to retain a sufficient amount of their dividends to pay taxes and to take the same and pay it over to the tax collector, this gave the bank power to retain from its stockholders a sufficient amount of the dividends to pay taxes legally levied, and which the stockholders could be legally required to pay. All payments made by the bank beyond this were made in its own wrong, and would be no defense to the bank against the demands of its stockholders for their dividends.

The stockholders might, notwithstanding such payment, properly demand and recover of the bank the face of their dividends, less the taxes legally levied, and they cannot be charged for moneys paid upon an illegal tax.

This money being paid by the bank of its own wrong, must be held to be money paid out of the proper funds of the bank and not out of the funds of its stockholders, and consequently, while in the hands of the collector it is the property of the bank, and it alone can bring suit to recover it back.

It seems to us that all the relief to which appellee is entitled can be reached in a single suit at law, brought by the bank as plaintiff, against the town collector as defendant, and that such relief at law is adequate, and we are therefore disposed to hold that equity has no jurisdiction.

In accordance with the views above set forth, the decree will be reversed and the bill dismissed for want of equity.

Decree reversed and bill dismissed.

MARVIN A. LAWRENCE ET AL.

v.

ORVILLE E. ATWOOD.

COMMISSIONS OF BROKER—CHANGE IN TERMS OF SALE.—The commissions of a broker for the sale of real estate are due when he has found a pur-

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Lawrence et al. v. Atwood.

chaser who buys the property, and his right to such commissions is not affected by a modification or change of the terms of payment, made between the buyer and seller, different from the terms first given by the seller to the broker.

APPEAL from the Superior Court of Cook county, the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. F. W. S. BRAWLEY, for appellants; as to the right of a broker to receive his commissions when he has found a purchaser who buys the property, cited Coleman's Heirs v. Meade, 5 Central Law Journal, 409; McGavock v. Woodfield, 20 How. (S. C.) 221; Rice v. Mayor, 107 Mass. 550; Chapin v. Bridges, 116 Mass. 105; Gluntworth v. Luther, 21 Barb. 148; Short v. Millard, 68 Ill. 292; Doty v. Miller, 43 Barb. 529; Middletown v. Findla, 25 Cal. 76; Chilton v. Butler, 1 E. D. Smith, 150; Morgan v. Maxon, 4 E. D. Smith, 626; Clapp v. Hughes, 1 Phil. 382; Barnard v. Monnot, 34 Barb. 90; Kock v. Emmerling, 22 How. 69; Bailey v. Chapman, 41 Mo. 536; Carter v. Webster, 79 Ill. 435; Mooney v. Elder, 56 N. Y. 238; Wharton on Agency, § 328.

Mr. W. H. HOLDEN and Mr. J. J. KNICKERBOCKER, for appellee; contended that insolvency of the purchaser is a good defense, and cited Hart v. Hoffman, 44 How. Pr. 168.

That the commissions were to be paid from the sum obtained: Bull v. Price, 20 Eng. Com. L. 113; Briggs v. Rowe, 1 N. Y. Ct. of App. 189.

That the broker must find a *sufficient* purchaser: McClare v. Paine, 49 N. Y. 563; Barnard v. Monnott, 42 N. Y. 204; Fraser v. Wyckoff, 63 N. Y. 448.

That the judgment ought not to be reversed, even though it appear to be against the weight of the testimony, because the finding of the court is equivalent to the verdict of a jury: Lowry v. Orr, 1 Gilm. 70; Bloom v. Crane, 24 Ill. 48; Jenkins v. Brush, 3 Gilm. 18; Sullivan v. Dollins, 13 Ill. 85; Roney v. Monaghan, 3 Gilm. 85; Chase v. Debolt, 2 Gilm. 371; Boyle v. Levings, 24 Ill. 223; Clement v. Bushway, 25 Ill. 200; Ambs v. Honore, 24 Ill. 122; Eastman v. Brown, 32 Ill. 53;

Lawrence et al. v. Atwood.

Weaver v. Crocker, 49 Ill. 461; Toledo, W. & W. R. R. Co. v. Elliott, 76 Ill. 67.

PLEASANTS, J. This was an action of assumpsit upon the common counts, brought by appellants, to recover commissions claimed to be due from appellee for services as brokers in finding a purchaser of his farm.

The Superior Court, upon a trial without a jury, found the issue for the defendant, overruled a motion for a new trial, and entered judgment against the plaintiffs for costs; from which judgment they appealed, and here assign for error, that the findings were against the law and the evidence.

Both of the averments, upon proof of which their right to recover depends, were controverted, viz: The making of the contract between the parties, and its performance on the part of the plaintiffs.

It appears that the defendant, desiring to sell, applied to Messrs. Phare and Dietrich, brokers, of Chicago, to find a purchaser, and that at their office, in the summer of 1873, Phare introduced the plaintiff Lawrence to the defendant, who there pointed out to him the property on a map, and after some conversation respecting it, which Phare did not hear, went out with him.

Lawrence testifies that at this interview the defendant gave him the price per acre, \$250.00, and the terms of payment, one-third or at least one-fourth of the whole amount, less an incumbrance of \$12,000 which the purchaser was to assume, in cash, and the residue in equal installments, with interest at one and two years, respectively, and promised to pay if he found a purchaser, a commission of two and one-half per centum.

It further appears that Lawrence made efforts to effect a sale, in the course of which he brought the property and terms to the attention of Messrs. Kerr, Davison and Welch, who were also doing business as real estate brokers in Chicago; that Kerr called on defendant with a view to purchase for himself and others, and upon an alleged misunderstanding as to the property offered declined to take it, but shortly afterwards arranged for a sale with Henry Crawford whom he introduced to defend-

Lawrence et al. v. Atwood.

ant, and which, after some negotiations between them was consummated on the 19th of August, 1873, for the price originally proposed, but with a modification of the terms of payment.

On that day the defendant executed his deed to Crawford for \$44,750, including the incumbrance which was assumed as a part of the consideration, and Crawford paid him \$1,000 in cash, and gave his notes for the residue, in three equal installments—one at ninety days, and the others at one and two years, respectively, and also other notes for the interest on the three so given, from date to maturity, and a deed of trust of the same premises to secure them. Failing, however, to meet the first when due, he re-conveyed the property, and his notes were cancelled. Lawrence swears that by the agreement between them, defendant was to pay one-third of the commissions to Phare & Dietrich directly, on the consummation of the sale, and the other two-thirds to him, of which he was to pay one-half to Kerr, Davison & Welch—thus distributing the whole amount equally among the three brokers employed in effecting the sale, according to a custom recognized by them. He claims in this suit only the two-thirds. Defendant positively denies that he ever promised the plaintiff to pay him any commissions, or dealt with him at all as a broker. He says that Lawrence was introduced to him as a person “who was dealing in land largely,” and was understood by him as “buying the property, or talking of investing in it himself;” that he said nothing about taking it to sell for him, and that no conversation in relation to commissions was had between them until after the trade was made.

He claims that he employed Phare & Dietrich only, and that if any commission had been earned he would be liable therefor to them alone; but further claims that commissions were not to be due until the cash payment of one-third the price was fully made, and that it never was so made.

The question then is, on which side, if either, and how great, if any, is the preponderance. To corroborate the statements of the defendant or of any of them on this point—the making of a contract with plaintiff—we find no evidence or circumstance

in all the record; while those of the plaintiff appear to us to be strongly supported by the testimony of disinterested and even of adverse witnesses. Thus his active agency in the matter of procuring a purchaser, and defendant's actual knowledge of it at the time, are shown by Welch and by the defendant himself. The former testifies that the property was brought to the attention of his firm by the plaintiff, and the latter that when Kerr came to see him, after the property was pointed out, he declined to take it, because, as he said, it was not the property that Lawrence gave him, and thereupon "Lawrence was sent for, and they had a dispute about it;" and further, that after that, "Lawrence, Phare and Kerr all talked the property up."

So the repeated recognition by the defendant of plaintiffs' right to participate equally with the two other firms, in the commissions to be paid, is proved by the testimony of Welch. The defendant also distinctly admitted it on the witness stand, and the receipt which he took from William H. Phare and offered in evidence recites it. He further stated that he had actually offered to Lawrence to pay him his share out of a check of Crawford, if he would cash it, although he says this offer was accompanied with the declaration that no commissions were due him, but whether because there was no contract or no performance, does not appear. We regard the inference from these collateral facts as irresistible, that plaintiff Lawrence was employed as a broker in this matter, either by the defendant or by Phare and Deitrich with his knowledge and approval, and probably by both; but if by either it is sufficient. We further regard it as fully proved that the commissions were to be two and one-half per centum; and whether the whole or only two-thirds or one-third was to be paid by defendant to plaintiffs is unnecessary here to determine, since the declaration was upon the *indebitatus* counts, and if either was promised and the plaintiffs performed their part, the finding and judgment of the Superior Court was erroneous.

Upon the other issue there is no dispute about the facts; the only question being whether they constitute performance by the plaintiffs of their contract to find a purchaser.

As a means to that end they employed another broker, and

Lawrence et al. v. Atwood.

he procured and introduced as such a party who was so accepted by the defendant and consummated the purchase, but upon terms differing in some particulars from those first offered; that is, instead of paying down in cash \$10,916.66, and giving two notes for the same amount each, at one and two years, with interest, he paid down \$1,000, and gave three notes for \$10,584, \$10,583 and \$10,583, at ninety days, one year and two years, respectively, with interest. Thus, although a portion of the proposed cash payment was deferred, it was but for a short time, and the proposed deferred payments were somewhat lessened. The change was not substantial. It was not effected by any agency or neglect of the plaintiffs, but by negotiations to which defendant was an immediate and principal party, and was by him freely consented to.

Such a change so effected should not, in our opinion, be held to defeat the claim of the broker for his commissions. Nor should the failure of the purchaser to pay the ninety-day note at maturity, and the consequent cancellation of the purchase by agreement of the parties to it, have that effect. He was none the less a purchaser within the meaning of the contract with plaintiffs. His purchase was in no degree contingent or provisional. An absolute deed was executed to him, which conveyed the entire title, and for so much of the consideration originally required as he did not pay in money he made and executed and delivered to the defendant enforceable contracts and securities of the character originally contemplated and to his acceptance and satisfaction at the time.

There is no pretense of fraud, misrepresentation or negligence on the part of the plaintiffs, or of the purchaser.

They were not guarantors of his ability to make any deferred payment, nor could their right to commissions be affected by the want of it—since he was accepted by the defendant, complied with all the terms required to consummate the purchase, and did actually consummate it. This question of ability, as affecting the broker's right in a case free from fraud, can only arise when the proposed purchaser is rejected notwithstanding his offer and readiness to comply with such terms and thus to consummate the purchase.

Here the defendant might have insisted upon the cash for one-third of the price, according to the terms given to the broker, and compelled its payment, or refused to sell, and so have clearly avoided all liability for commissions; or, distrusting Crawford's ability to make the deferred payments notwithstanding his offer and readiness to comply with all the terms to be presently fulfilled, he might have rejected him on that ground, and in that case have defended against the claims for commissions by making proofs sufficient to overcome the legal presumption of ability; but he did neither. He consented at the instance of the purchaser to some modification of the terms he had submitted—not however making a substantially different contract, as in some of the cases cited—and fully completed the sale accordingly.

Thereupon the broker became entitled to his commissions, unless his right was postponed by special agreement: *McGavock v. Woodfield*, 20 How. 221; *Coleman's Heirs v. Meade*; 5 Cent. Law Jour. 409; *Wharton on Agency*, Sec. 328; *Bernard v. Monnott*, 42 N. Y. 204; *Frazer v. Wyckoff*, 63 N. Y. 448; *Carter v. Webster*, 79 Ill. 436.

The defendant claimed that it was postponed until, and made contingent upon, the full payment of the ninety day note. All the proof offered by him on this point was his own statement that such was his agreement with Phare & Dietrich, and a receipt from Phare containing a recital to the same effect. But such an agreement could not affect the rights of plaintiffs, who were strangers to it, and the admission of any evidence of it against their objection was therefore improper.

It is clear that commissions were to be due when a purchaser should be found, which would certainly be when the purchase should be made. This was satisfactory to the defendant, because the terms of sale originally proposed contemplated that one-third or one-fourth of the price would then be paid. But the ninety day note with the \$1,000 cash paid, would amount to more than one-third of the whole price after deducting the incumbrance which was assumed. It does not appear that plaintiffs had any notice or suspicion of the change in the terms until after it was made and the sale was consum-

Gottfried v. German National Bank.

mated, and we discover no evidence of any consent on their part afterwards to the further postponement and contingency of their claim to accord with these changes in the terms of sale. We are of opinion, then, that the fact of performance of the contract on the part of plaintiffs was also clearly established, and like that of the contract made, by so great a preponderance of evidence as to make the finding of the issue against them error; for which we reverse the judgment entered thereon and remand the cause.

Judgment reversed and cause remanded.

MATHEWS GOTTFRIED
V.
THE GERMAN NATIONAL BANK.

1. PRACTICE—AFFIDAVIT OF PLAINTIFF'S CLAIM—SUFFICIENCY.—An affidavit accompanying the declaration that "the demand in the above entitled cause is for the amount due on a promissory note, a copy of which is hereunto attached in possession of the defendant, and there is due to the plaintiff from the defendant, after allowing to him all just deductions and set-offs, five hundred and eighty-four dollars and sixty-two cents, with interest from December 28, 1877," is not a substantial compliance with Sec. 37 of the Practice Act; it does not state the "amount due from the defendant to the plaintiff," nor does it state such facts as furnish the basis for a calculation of the amount due.

2. REFERENCE IN AFFIDAVIT TO OTHER PAPERS.—An allusion in an affidavit to a copy of a note, without any apt or proper words making such copy a part of the affidavit, will not authorize the court to refer to such copy for any purpose connected with the affidavit.

3. CONSTRUCTION OF STATUTE.—The statute permitting a plaintiff to file with his declaration an affidavit of the amount due, and authorizing judgment thereon, upon failure of the defendant to file with his plea an affidavit of merits, is remedial, and should receive such interpretation as will meet the obvious intent of the legislature in its enactment.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. RUBENS & HEISTAND, for appellant.

Gottfried v. German National Bank.

Messrs. TENNEYS, FLOWER & ABERCROMBIE, for appellee.

MURPHY, P. J. This was an action of assumpsit, commenced by the appellee against the appellant, in the Superior Court of Cook county, to the January term, A. D. 1878, to recover upon a promissory note.

The proceedings in that court resulted in a judgment against appellant, from which he prayed an appeal to this court, and brings the record here, and assigns for error:

1st. The striking the plea of the defendant from the files.

2nd. That the judgment of the court is contrary to law.

The appellee, by the commencement of its suit as it did, attempted to avail itself of the provisions of section 37, chapter 110, of the Revised Statutes of 1874, entitled an act in regard to practice in Courts of Record. By that section it is provided that: "If the plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant, or his agent or attorney, if the defendant is a resident of the county in which the suit is brought, shall file with his plea an affidavit stating that he verily believes he has a good defense to said suit upon the merits to the whole or any portion of the plaintiff's demand, and if a portion specifying the amount (according to the best of his judgment and belief), upon good cause shown, the time for filing such affidavit may be extended for such reasonable time as the court shall order."

* * * * *

This statute is intended to provide a remedy for the plaintiff when he believes there is no substantial defense to his claim, and desires the speedy judgment of the court, as it is seen he must file an affidavit with his declaration, showing the nature of his demand, and the amount due him from the defendant, after allowing all his just credits, deductions and set-offs, if any.

It appears in this case that the appellee filed its declaration, counting upon a promissory note specially, and also containing

Gottfried v. German National Bank.

the common counts; also filed an affidavit, which, after being properly entitled in the cause, is as follows:

“Otis P. Abercrombie, one of the plaintiff’s attorneys, being duly sworn, says that the demand of the plaintiff in the above entitled cause is for the amount due on the promissory note, a copy of which is hereunto attached, in possession of defendant, and there is due to the plaintiff from the defendant, after allowing to him all just credits, deductions and set-offs, five hundred and eighty-four dollars and sixty-two cents, with interest from December 28, 1877.

[SEAL.]

(Signed) OTIS P. ABERCROMBIE.”

It is urged by the appellant that this affidavit is defective, and fails to comply with the requirements of the foregoing section of the statute, in that it does not state the “amount due from the defendant to the plaintiff.” Nor does it state such facts as to furnish the court the basis of a calculation by which it can be ascertained the amount so due. It will be observed that the affidavit states the amount of the principal indebtedness, and adds “with interest from December 28, 1877.”

If the affidavit contained the statement of the rate per cent. at which such interest should be computed, it might be held to be a substantial compliance with the provisions of the statute, but on this question the affidavit filed is silent, except so far as it makes allusion to a copy of the promissory note attached to said affidavit, without any apt or proper words to make said copy a part of the affidavit. It will be seen by the statute, that it is from the affidavit the court must learn the amount due to the plaintiff from the defendant, and not by an inspection of a separate piece of paper, which is not even a part of the record.

As in this case, the copy referred to in the affidavit was the copy filed with the declaration, under the statute, which, under repeated decisions of the Supreme Court of this State, is held to constitute no part of the record, we think the affidavit fails to comply with the substantial requirements of the above section.

Gottfried v. German National Bank.

It is urged by the appellant that the foregoing provision of the statute is in derogation of the common law, and should receive a strict construction. Even though it be admitted that it is in derogation of the common law, still it will be seen that the statute is remedial as well, and its objects are wise, and calculated to facilitate the prompt collection of just claims, to which there is no substantial defense, and should receive such interpretation at the hands of the court as will promote the obvious object of the legislature in its enactment.

Even under such rules of construction, for the foregoing reasons we are unable to hold the affidavit good, and as required by law.

If therefore, as we have shown, the affidavit fails to comply with the statute, it follows as a consequence, that the appellant was not bound to file any affidavit of merits with his plea, and if not, then it was error for the court below to require an affidavit of merits, and in striking appellant's pleas from the files, for the reason that no such affidavit was filed.

We find the amount of damages assessed to be in excess of the amount due on the promissory note, even though we were at liberty to make it the basis of our action, but the appellant makes no point in that regard by his assignment of error.

We make it the basis of no action of ours, but simply call attention to it, so that upon a second trial of the case, it might be corrected. For the above error, the judgment in the court below is reversed and the cause remanded.

Reversed and remanded.*

* Another case between the same parties, and involving the same questions, was considered in connection with this case and reversed on grounds stated in this opinion.

Peck v. Standart.

WALTER L. PECK

V.

GEORGE G. STANDART.

1	228
76	354

1. LIEN FOR MATERIALS—REQUISITES OF PETITION—FAILURE IN PROOF.—It is requisite to the creation of a lien for materials furnished in the erection of a building, that the contract for furnishing such materials should specify some definite time within which the materials are to be furnished, and a petition to enforce such a lien should so allege. It is equally necessary that such time should be proved or admitted on the hearing, and a failure to make such proof is fatal.

2. VARIANCE.—The contract as alleged, was to furnish hardware to Edwin A. Rice, at the usual market price. The proof did not show that all the hardware was to be furnished at the usual market price, but that on some articles a discount was to be made; and the proof further showed a contract with Edwin A. Rice & Co. These variances must be regarded as substantial.

3. WAIVER OF LIEN BY ACCEPTING A NOTE.—It was further objected that the claim for lien was waived by the acceptance of a note for the balance due, and that the decree was defective in declaring a lien upon the five houses *en masse*; but since Rice & Co. were personally liable for the goods, and there is evidence tending to show that the goods were furnished, not for each house respectively, but for the whole, as a whole, and that they were under one roof, the court is not prepared to say that the objections are well taken.

APPEAL from the Circuit Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

Messrs. HUNTER & PAGE for appellant; as to the essential requisites of the contract, cited Powell v. Webber, 79 Ill. 134; Hurd's Stat. 634, § 3.

That the acceptance of a note for the balance due discharged the lien upon the buildings: Benneson v. Thayer, 23 Ill. 374; Kinzey v. Thomas, 28 Ill. 502; Croskey v. Corey, 48 Ill. 442.

That the lien should have been decreed against each of the houses, according to the value of the materials furnished upon them respectively: Steigleman v. McBride, 17 Ill. 300; James v. Hambleton, 42 Ill. 308; Culver v. Elwell, 73 Ill. 536.

A mechanics' lien is in derogation of the common law: Carney v. Tully, 74 Ill. 375.

Mr. HENRY W. LEMAN, for appellee; upon the point that the

taking of a note is not a waiver of the lien, cited *Van Court v. Bushnell*, 21 Ill. 627; *Brady v. Anderson*, 24 Ill. 112.

PLEASANTS, J. We reverse the decree of the Circuit Court in this case for defect of proof in some particulars, and its variance from the allegations in others.

Appellee filed his petition to enforce an alleged lien for the balance due on account of hardware furnished by him towards the construction of five houses in the city of Chicago, against Edwin A. Rice as owner, and appellant and others as subsequent purchasers or encumbrancers of the premises. It alleged that on the 12th day of August, 1875, or thereabouts, the said Rice, then erecting or about to commence the erection of said houses on lots described, of which he was the owner, contracted with petitioner for the sale and delivery to him of hardware to be used in and about the same; that no particular amount was contracted for, nor was the kind or quality specifically named or the time or times of delivery definitely fixed, but it was understood and agreed between them that petitioner should furnish and deliver to said Rice such quantities of hardware and other materials, and of the kind and quality as he might have for sale, and said Rice might need in and about the construction of said buildings, and should order from time to time during the process of their erection, which was to be completed on or before the thirtieth day of October, 1875, and that the whole amount was to be furnished within that time, at the usual and market prices, and to be paid for in thirty days after delivery.

Rice was served by publication, and with one of the other defendants, defaulted; the petition was dismissed as to a third, and appellant answered, denying the contract and most of the other matters alleged.

In relation to the terms of the contract the only witness was the petitioner himself, who testified that he sold and delivered to said Rice the hardware specified in the several bills attached as exhibits to the petition, at the times and prices therein stated, for the houses described, and that it all went into them. Being asked "if the prices charged in these bills were the reasonable market prices of the different articles at that time," he

Peck v. Standart. ,

answered "Yes, sir—well, under our contract." The question was then put: "What contract did you have with him?" to which his answer was: "I was to send a certain line of goods at a certain line of discount, and nails at wholesale market prices." And this answer embraces all the evidence appearing in the record respecting the terms of the contract.

So it does not appear that the time for completing the furnishing of the goods was not to be beyond three years from the commencement thereof, nor that the time of payment was not to be beyond one year from that of such completion. There was no evidence tending to show when or within what time the erection of the buildings was to be or was in fact, if ever, completed; or that the hardware was to be furnished by the thirtieth day of October, 1875, or any other time certain.

The petition sets out a contract, which though not definite as to some, was yet clearly expressive as to all, of its particulars—not one was left to implication; and it is requisite to the creation of a lien by such a contract that it fix a definite time, not necessarily at which, but certainly within which, the materials are to be furnished: *Powell v. Webber*, 79 Ill. 135; *Fish v. Stubbings*, 65 Id. 492; *Cook v. Vreeland*, 21 Id. 431. The one in question here, according to the allegation, did fix such a time. It was therefore equally necessary that it should be so proved unless admitted. The petition being taken *pro confesso* against Rice, might perhaps have sufficed without any proof upon this point as to him. But appellant had an interest and a right to contest the validity of the appellee's claim to a lien, and is not affected by the default of Rice. He denied the contract as alleged, and as against him it must be proved. It was not so proved, and the defect is fatal.

Furthermore, it did appear that not all of the hardware contracted for was to be furnished at the usual and market price, according to the contract as alleged, although how much was not and at what discount is not shown. And also by the testimony of petitioner on his being recalled, and of others, that the arrangement was not made with, or the goods furnished to, Edwin A. Rice, as alleged, but Edwin A. Rice & Co., that is, said Rice and Thomas Pickering, who were partners and erect-

 Beveridge v. Chetlain.

ing said houses on joint account. Accordingly, after the testimony was all in, the counsel for petitioner asked leave to amend the petition so as to charge the goods to said Edwin A. Rice & Co., instead of Edwin A. Rice, which was granted. But it does not appear that the amendment was actually made, and the decree finds, in the face of the fact so proved and admitted, that the contract was made between Edwin A. Rice of the one part, and the appellee of the other. These variances we regard as substantial.

It was further objected against the decree that the lien was waived by the acceptance by appellee of the note of Edwin A. Rice & Co. for the balance claimed to be due, which was fully proved, and also that the lien was declared against the five houses *en masse*; but since E. A. Rice & Co. were personally liable for the goods, and there is evidence tending to show that the goods were furnished, not for the several houses respectively, but for the whole, as a whole, and that they were under one roof, we are not prepared to say that these objections were well taken.

For the defects and variances above indicated, however, the decree is reversed and the cause remanded.

Reversed and remanded.

 JOHN L. BEVERIDGE, use, etc.,

v.

AUGUSTUS C. CHETLAIN, Administrator.

1	231
1978	456

1. RESTORING LOST RECORDS UNDER BURNT RECORDS ACT—SECONDARY EVIDENCE.—The relief afforded to parties under the Burnt Records Act, is not exclusive, but cumulative, upon the rights and remedies existing independently of its provisions. Where a judicial record is shown to be lost or destroyed, resort may be had to secondary evidence to prove its contents. Notwithstanding some portions of the record were restored under the provisions of the Burnt Records Act, secondary evidence of other portions not so restored, may still be given.

2. PRACTICE IN RESTORATION OF RECORDS—NOTICE.—Where the surety on a bail bond had no notice of the proceedings by which the affidavit and

Beveridge v. Chetlain.

pleadings in the case were restored, the restored record, at least so far as he was entitled to be heard on the question of its correctness, was, as to him, a nullity. To that extent it could not be received in evidence against him, or his legal representative. But, had such surety been served with notice of the petition to restore the declaration and pleas in the case, it is difficult to see upon what principle he would have been entitled to object that the copies offered to be substituted were not true copies of the original. He was in no sense a party to the suit, and had no interest in the subject matter, except so far as establishing the identity of the cause of action.

3. **RESTORING AFFIDAVIT FOR CAPIAS—NOTICE TO SURETY ON THE BAIL BOND.**—The liability of the surety on the bail bond, was directly dependent upon the sufficiency of the affidavit upon which the *capias* issued, and he was therefore directly interested in seeing to it that the original affidavit was restored with literal accuracy, and before the restored affidavit could be made competent evidence against him or his administrator, he should have been notified, so that he might have an opportunity to appear and object; therefore, there having been no notice to the surety of the restoration, the burden of proof was upon the party offering, of proving the contents of the original affidavit by secondary evidence, precisely as though no steps had been taken to restore the same.

4. **BAIL BOND—VALID THOUGH NOT IN DOUBLE THE AMOUNT ENDORSED UPON THE WRIT.**—A bond, although taken in a sum less than the statute requires, may still be held to be a valid bond, at least at common law. The provisions of the statute requiring the sheriff to take a bail bond in double the sum for which bail is required, are directory merely, and a bond taken for a less sum is valid and may be enforced.

5. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—The only proof of the sum endorsed on the writ, was the evidence of one witness, who testified that it was either \$3,000 or \$3,500. After the entry of judgment, and during the same term the affidavit of this witness was given in support of a motion for new trial, stating that the witness now recollected positively that the sum endorsed was \$1,500. If the validity of the bond depended upon the amount endorsed upon the writ, the testimony of the witness, according to his subsequent recollection, would set the question at rest, and being decisive of an important question involved in the litigation, the appellant should have been accorded an opportunity of introducing it.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. MILLER & FROST and A. L. ROCKWELL, for appellant; arguing that a bail bond is valid, although not in double the amount endorsed upon the writ, cited *Fournier v. Faggot*, 3 Scam. 347; *Young v. Mason*, 3 Gilm. 55; *Pritchett v. The People*, 1 Gilm. 525; *Holbrook v. Klenert*, 113 Mass. 268.

Beveridge v. Chetlain.

That the bond having been destroyed by fire, secondary proof of its contents was admissible: 1 Greenl. Ev. 109; Starkie's Ev. 271; Buchanan v. Moore, 10 Serg. & Rawle, 275; White v. Lovejoy, 3 Johns. 448; Dillingham v. Snow et al. 5 Mass. 547; Stockbridge v. West Stockbridge Co. 11 Mass. 400; Harvey v. Thomas, 10 Watt. 63; Heirs of Ludlow v. Johnson, 3 Ohio, 69; Nelson v. Boynton, 3 Met. 96.

That a new trial should have been granted: DeGion v. Dover, 2 Aust. 517; Hewlett v. Cruchley, 5 Taunt. 277; Richardson v. Fisher, 1 Bing. 155.

Messrs. SMALL & MOORE, for appellee; that a bail bond is void unless taken pursuant to the statute, cited Fournier v. Faggot, 3 Scam. 347; Stafford v. Low, 20 Ill. 152.

That the statute having provided a method of restoring lost records, and the plaintiff having restored a portion of the record under the statute, no action can be maintained upon the bail bond unless the same has been restored: Steveson v. Earnest, 80 Ill. 513.

BAILEY J. On the 20th of October, 1868, Oliver Smith being about to commence, in the Circuit Court of Cook County against one George Aylesworth, an action on the case for false imprisonment, filed his affidavit as required by the statute, and thereupon sued out a writ of *capias ad respondendum*, upon which said Aylesworth was arrested and held to bail. Aylesworth, thereupon, executed to John L. Beveridge, then sheriff of Cook county, a bail bond in the penal sum of \$3,000, with Martin O. Walker as his surety, and was discharged from said arrest.

While this suit was pending and undetermined, the files and records in the case were destroyed by the great fire of October 9th, 1871. Afterwards the plaintiff filed a petition under the provisions of the act of March 19, 1872, relating to the restoration of lost records, to have a certain portion of the records in said suit restored; and upon notice to Aylesworth, an order was entered restoring the affidavit, declaration and pleas. A trial was afterwards had, resulting in a judgment in favor of the plaintiff and against the defendant for \$6,000 and costs. Upon

Beveridge v. Chetlain.

this judgment a writ of *feri facias* was duly issued and returned wholly unsatisfied. Subsequently a writ of *capias ad satisfaciendum* was issued against Aylesworth, and returned *non est inventus*.

Pending these proceedings, Martin O. Walker, the surety on the bail bond, died, and after the return of the last mentioned writ, a claim against his estate was filed in the County Court of Cook county, to enforce his liability on said bond. The County Court, upon a hearing of the matter of this claim, found the issues for the administrator and rendered judgment against the claimant for costs. From this decision said claimant prosecuted an appeal to the Circuit Court, and upon a trial in that court the issues were found for the administrator, and the Court, after overruling a motion by said claimant for a new trial, rendered judgment against him, affirming the judgment of the County Court and for costs. Subsequently, at the same term, a further motion was interposed to vacate said judgment and award a new trial, on the ground of newly discovered evidence, which motion was overruled and exception taken.

On the trial in the Circuit Court appellant was permitted, against the objection of appellee, to give in evidence the restored affidavit and pleadings, and also to give secondary evidence of the original *capias ad respondendum*, the endorsement thereon, and the bail bond. The judgment below being in appellee's favor, we cannot see how he has been prejudiced by this ruling, even if it was erroneous. He has assigned no cross errors, and we are aware of no principle upon which he can be permitted to call it in question. As the admissibility of this testimony, however, has been elaborately argued by counsel on both sides, we are inclined to indicate our opinion in respect to it.

So far as secondary evidence was admitted to prove the contents of the portions of the record not restored, we think the ruling of the Court below was undoubtedly correct. The relief of which parties may avail themselves under the provisions of the Burnt Records Act is not exclusive, but is merely cumulative upon the rights and remedies existing independently of its provisions. It has always been held that where a judicial

Beveridge v. Chetlain.

record, or other paper is shown to be lost or destroyed, resort may be had to secondary evidence to prove its contents. Records are deemed, in law, to be still in existence and binding upon the parties whose rights are affected thereby, although, in point of fact, they may have been destroyed. A judgment of a court, or a bond entered into in the course of a judicial proceeding, loses none of its vitality upon destruction of the writing, which is the primary evidence of its existence. Its contents may still be proved, and its provisions enforced to the same extent as though the paper itself were capable of being produced in evidence. The *capias* and bond having been destroyed, appellant was entitled to avail himself of their provisions by means of secondary evidence notwithstanding the restoration of other portions of the record under the provisions of the act.

But it appears that the surety on the bail bond had no notice of the proceedings by which the affidavit and pleadings were restored. The restored record, at least so far as he was entitled to be heard on the question of its correctness, was, as to him, a nullity. *Harris v. Lester et al.* 80 Ill. 307. To that extent it could not be received in evidence against him or his representative. This being the case, we fail to see any principle upon which it can be set up as a ground for excluding secondary evidence of those portions of the record not restored.

We think the court decided correctly in admitting in evidence the restored record of the pleadings. Had the surety on the bail bond been served with notice of the petition to restore the declaration and pleas, we cannot see upon what principle he would have been entitled to object that the documents offered to be substituted for those destroyed were not true copies of the same. He was in no sense a party to the pleadings, and had no interest in their subject matter, except so far as they might be resorted to for the purpose of establishing the identity of the cause of action upon which the judgment was rendered with that for which the *capias* was issued. That identity depended upon the condition of the pleadings as they stood at the time of the trial and judgment, and not upon their condition at any previous period in the history of the suit. It

Beveridge v. Chetlain.

would have been competent for the parties, by leave of the court, at any time before final judgment, to have changed the form of the pleadings to any extent, provided the identity of the subject matter of the litigation was preserved; and such changes would in no manner have affected the liability of the surety on the bond. It was then unimportant, so far as the surety was concerned, whether the pleadings restored were or were not identical with those destroyed.

We are inclined, however, to doubt the correctness of allowing the record of the restored *affidavit* to be given in evidence against the appellee. The liability of the surety on the bail bond was directly dependent upon the sufficiency of the affidavit, and had appellee been able to show that the case there made was not sufficient to justify the issuing of the *capias*, he would have made out a complete defense. *Stafford v. Low*, 20 Ill. 152. The surety, then, was directly interested in seeing to it that the original affidavit was restored with literal accuracy, and before the restored affidavit could be made competent evidence against him or his administrator, he should have been notified, so as to have had an opportunity to appear and object to filing any paper not an exact, or at least in all respects a substantial, copy of the original. It would seem, therefore, that the burden was on appellant, of proving the contents of the original affidavit by secondary evidence, precisely as though no steps had been taken to restore the same.

The court below, upon the trial, held the bail bond to be void on the ground that it appeared that it was not taken in double the sum in which the defendant was ordered to be held to bail. The bond is shown to have been in the sum of \$3,000, and in the affidavit of appellant's claim filed in the County Court, which, in this record, stands in the place of a declaration, it is averred that upon filing the affidavit for a *capias*, the defendant was held to bail in the sum of \$3,000.

By the statute in force at the time the *capias* was issued, it was provided that the clerk of the court, upon the delivery to him of a sufficient affidavit to hold to bail, should issue a *capias* and make an order thereon, specifying the amount in which the defendant should be required to give bail, and that the

sheriff to whom the writ was directed should take a bail bond to himself, with sufficient security in a penalty double the sum for which bail was required.

According to the case made by the pleadings and proofs, it would seem that the sheriff who executed this *capias* failed to obey the direction of the statute in relation to the amount of the bond, and inserted a penalty in the sum indorsed on the writ instead of double that sum.

We think the court below erred in holding the bond to be void, for this reason. Although taken in a sum less than the statute required, it may still be held to be a valid bond, at least, at common law. "When bonds varying in some respects from the requirements of statutes have been given, there has been always a strong disposition to hold them to be good at common law if the parties to the instrument were right, and if the bond was in substance that which the obligors had a right to make, and contained no conditions contrary to those which were prescribed by law." *Holbrook v. Klenert*, 113 Mass. 268. Thus, where the statute requires the surety in a bail bond to be a resident of the state, yet if a non-resident be received as bail, it is held that he will be bound. *Commonwealth v. Ramsey*, 2 Duval, 385; *Glezen v. Rood*, 2 Metc. (Mass.) 490. So, also, where the statute requires two or more sureties, and but one signs the bond. *Holbrook v. Klenert*, *supra*; *Lane v. Smith*, 2 Pick. 280, 283. It has been frequently held in Massachusetts that a bond for the liberty of the jail yard, though taken for less than double the sum for which the prisoner is committed, and so not within the statute, is still a good bond at common law, and may be enforced as such: *Clapp v. Cofran*, 7 Mass. 98; *Freeman v. David*, Id. 200; *Burroughs v. Lowder*, 8 Id. 373.

In *Whittier v. Way*, 6 Allen, 288, it appears that the statute provided that where a debtor was arrested on execution, and carried before a magistrate, the magistrate might "accept his recognizance with surety or sureties in a sum *not less* than double the amount of the execution." In that case the recognizance was taken in a sum less than double the amount of the execution on which the debtor was arrested; and the court, in

Beveridge v. Chetlain.

holding the bond to be valid, use the following language: "This provision in reference to the minimum sum is principally for the security of the creditors. The acceptance of the recognizance is for the present relief of the debtor; to free him from arrest and set him at liberty until the arrival of the time duly fixed for his examination, preparatory to the administration of the oath which he desires to take. This object is attained, and he has the full advantage of it, although the magistrate has not strictly followed the directions of the statute. The obligation is voluntarily assumed by him and his sureties; nothing beyond what the statute allows has been required of him. Neither he nor they can be injuriously affected in consequence of the recognizance being accepted in a sum *less* than that which might have been required. It is the creditor only who can have any possible cause of complaint on this account; and if he is contented to abide by it there seems to be no reason why it should not be enforced. The magistrate being authorized to accept the recognizance, the provision in relation to the sum in which it is to be taken may be considered as directory only; and if no burden or obligation is imposed upon or required of the debtor beyond what the law allows, there is no reason why a recognizance voluntarily entered into by him and his sureties should be held to be invalid. It is otherwise when a party in custody, in order to obtain liberation, is compelled to assume an obligation *greater* than that which the law requires of him."

In the light of these authorities we are of the opinion that the provision of the statute requiring the sheriff to take a bail bond in double the sum for which bail was required, was *directory* merely, and that a bail bond taken for a *less* sum, is valid and enforceable.

We also think the court below erred in overruling appellant's motion for a new trial, based on the ground of newly discovered evidence.

The only witness by whom appellant proved the order endorsed on the *capias* fixing the sum in which the defendant should be held to bail, was the attorney who drew the affidavit and sued out the writ. This witness, when examined upon the trial below, was unable to fix the sum endorsed on the writ

Beveridge v. Chetlain.

with certainty, but gave it as his recollection that said sum was either \$3,000 or \$3,500. After the entry of judgment and during the same term an affidavit of this witness was filed on behalf of appellant, stating that he was mistaken in his testimony in this respect, and that since the trial the circumstances of the issuing of the *capias* and of the indorsement thereon of the amount of bail had come back to his remembrance, so that he now distinctly recollects and is positive that said endorsement was \$1,500 instead of \$3,000.

Many cases are to be found where new trials have been awarded upon grounds similar to those here presented: *Mitchell v. Bass*, 26 Texas, 372; *Scofield Rolling Mill Co. v. The State*, 54 Georgia, 636; *De Gion v. Dover*, 2 Anst. 517; *Hewlett v. Cruchley*, 5 Taunt. 277; *Richardson v. Fisher*, 1 Bing. 145. See, also, *Archer v. Heidt*, 55 Georgia, 200.

If the validity of the bond depends upon the amount of bail endorsed upon the writ, the testimony of this witness, if he is permitted upon another trial to correct his mistake and give evidence according to his present clear and positive recollection, will, so far as we can perceive, place the question of its validity beyond controversy. This testimony being so clearly decisive of an important question involved in the litigation, and a question which upon the view of the law taken by the court below was controlling, appellant should have been accorded an opportunity of introducing it.

We cannot see that appellant was guilty of any laches in not producing this testimony on the trial. The mistake was clearly a mistake of the witness, for which he was not responsible.

It is true this testimony, if introduced, will make a case variant from the one made by the pleadings. This we think was no sufficient answer to the motion to set the judgment aside and award a new trial, for the purpose of allowing it to be given. It is the evident intention of the twenty-third section of the Practice Act, that the rights of parties litigant should be determined upon the cases made by their proofs, and that their rights should not be denied in consequence of mistakes of pleading, at least until their attention is so directed to the erroneous averment as to afford an opportunity to make appli-

 Fabbri v. Cunio.

cation to the court for leave to amend. Before another trial, appellant should be accorded an opportunity, if he desires it, of so amending his pleading as to make it conform to the proofs which he now expects to be able to introduce.

For the errors above pointed out, the judgment is reversed and the cause remanded.

Reversed and remanded.

CHARLES FABBRI
v.
MARY CUNIO.

1	240
86	255
1	240
105	1628

1. APPEAL FROM JUSTICE OF THE PEACE—PRACTICE—SUMMONS TO CO-DEFENDANT.—A defendant against whom no judgment was rendered in the trial before the justice, need not be summoned to appear in Circuit Court as a party defendant, on appeal by a co-defendant against whom a judgment was rendered below. In perfecting an appeal, it is necessary to bring before the Circuit Court only those persons who were parties to the judgment appealed from.

2. SECONDARY EVIDENCE—RECORD OF DEED.—Before a party is entitled to read in evidence the record of a deed, it is incumbent upon him to show by proper proof, that the original deed is lost, or not in his power to produce in court; and that to the best of his knowledge, it was not intentionally destroyed or disposed of for the purpose of introducing a copy thereof as evidence.

3. PREMATURE ACTION—PERFORMANCE OF CONDITION PRECEDENT.—The testimony showed that the money, which was the subject matter of the suit, was to be paid upon the dismissal of a certain suit then pending. This action was brought before dismissal of such suit. *Held*, that the dismissal of the former action was a condition precedent to payment of the money, and an action begun before such dismissal, was prematurely brought.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Mr. E. HANEY, for appellant; upon the question of suit being prematurely brought, cited Mullett v. Shrumph, 27 Ill. 110; Dickerson v. Sutton, 40 Ill. 403; 2 Pick. 368; 3 Wend. 479; 17 Wend. 419.

Fabbri v. Cunio.

Messrs. M. A. RORKE & SON, for appellee; that a compromise of a legal claim or right is a sufficient consideration to support a promise to pay, cited *Foster v. Allanson*, 2 T. Rep. 479; *Miller et al. v. Hawker*, 66 Ill. 185; *McKinley v. Watkins*, 13 Ill. 140; 1 Wm. Saund. Rep. 210; 1 Par. on Con. 440; *Burnside v. Potts*, 23 Ill. 411; *Honeyman v. Jarvis*, 79 Ill. 318; *Buchanan v. International Bank*, 78 Ill. 500.

As to the introduction of a certified copy of a deed as evidence: Rev. Stat. 836, § 21; *R. R. I. & St. Louis R. R. Co. v. Lynch et al.* 67 Ill. 149; Rev. Stat. 299, §§ 35, 36.

As to admission of testimony of a husband in a suit where the wife is a party: Rev. Stat. 489, § 5; *Straubher et al. v. Mohler*, 80 Ill. 21.

Upon the point of preponderance of testimony: *Murray v. Haverty* 70 Ill. 318; *White v. Stanbro*, 73 Ill. 575; *Hudson v. Hadden*, 82 Ill. 265; *Peoria A. & D. R. R. Co. v. Sawyer*, 71 Ill. 361; *Carpenter v. Davis*, 71 Ill. 395; *Ryan v. Donnelly*, 71 Ill. 100; *Crist v. Wray*, 76 Ill. 204.

Error cannot be assigned on behalf of a party who does not appear, and has not been served; *Stewart v. Hibernian Banking Ass'n*, 78 Ill. 596; *Van Valkenberg v. Trustees of Schools*, 66 Ill. 103; *Clark et al. v. Marfield*, 77 Ill. 258; *Horner v. Zimmerman*, 45 Ill. 14; *Cromine v. Tharp*, 42 Ill. 120; *Tibbs v. Allen* 27 Ill. 119; *Henrickson v. Van Winkle*, 21 Ill. 274; *Richards v. Green*, 78 Ill. 525; *Fonville v. Sausser*, 73 Ill. 451; *Havighorst v. Lindberg*, 67 Ill. 463.

BAILEY, J. In this case appellee brought suit before a justice of the peace against Charles Fabbri, the appellant, and Sarah Fabbri, his wife. Summons was duly served on both of the defendants, and upon a trial before the justice of the peace, a judgment was rendered in favor of appellee against appellant alone, for \$200 and costs. As to the other defendant, judgment was rendered in her favor against appellee.

From this judgment appellant took an appeal to the Circuit Court of Cook county, where the issues between him and appellee were again tried, resulting in a verdict for appellee, and a judgment in her favor against appellant for \$200 and costs.

Fabbri v. Cunio.

It is objected that the judgment in the Circuit Court was erroneous, because no summons was issued to Sarah Fabbri, and she was not made a party to the proceedings in that court upon the appeal.

The section of the statute under which it is insisted that summons should have issued to Sarah Fabbri before a trial could properly be had in the Circuit Court, is as follows:

“When an appeal shall be taken by one of several parties from the judgment of a justice of the peace, the clerk of the court shall issue a summons against the other parties, notifying them of the appeal in the said court, and requiring them to appear and abide by and perform the judgment of the court in the premises, which summons shall be served as other process issued in appeal cases, and in case such summons shall be returned that parties are not found, the cause shall, at the first term of the court, be continued, but at the second term may be tried, and the court shall have power to give the same judgment as though *all the parties to the judgment* had joined in the appeal, unless the appearance of the appellee shall be entered as herein provided.” R. S. 1874, Chap. 79, Sec. 70.

Under this section it was necessary to bring before the Circuit Court only the persons who were the parties to the judgment appealed from. While it is true that both Charles and Sarah Fabbri were sued, the judgment from which the appeal was taken was rendered against Charles alone. The other defendant had established her defense, and a separate judgment was rendered in her favor against appellee. She was not, within the meaning of the statute above quoted, a party to the judgment against her co-defendant. For all the purposes of the appeal she was to be treated the same as though she had never been joined in the suit.

The object of the statute is to provide, in cases where one of several joint parties to a judgment appeals, for bringing before the court the other joint parties, so that upon trial a proper judgment may be rendered against them all.

Where, however, upon a trial before a justice of the peace, part of the defendants succeed in establishing their defense,

Fabbri v. Cunio.

and judgment is rendered against the remaining defendants alone, the defendants against whom judgment is rendered cannot by appealing, subject their co-defendants who have successfully defended, to a re-trial of the suit. We think in this respect there was no error in the proceedings of the Circuit Court.

The circumstances out of which the indebtedness for which this suit was brought arose, are briefly as follows: On the 15th day of August, 1871, appellee's husband, Joseph Cunio, being the owner of a house on Van Buren street, Chicago, and of a leasehold interest in the lot on which said house stood, conveyed said premises to appellant in consideration of \$1,200 cash, and a house and lot on West Chicago Avenue. In consummation of this trade, appellant and wife, with the consent of said Joseph Cunio, executed a deed with covenants of warranty, purporting to convey said West Chicago Avenue property to appellee. This deed was duly recorded, and at the time of the great fire of October 9th, 1871, both the deed and record were destroyed.

In March, 1872, appellant and wife executed to appellee a second warranty deed for said premises, which was filed for record March 15th, 1872. Subsequently an action of ejectment was commenced against appellee and others by one Ferdinand Lubcke, to recover said West Chicago Avenue property, which resulted in a judgment against appellee and her co-defendants, whereby appellee was evicted from said premises. Appellee thereupon brought her action in covenant against appellant and wife, upon the covenants contained in said second warranty deed. While this suit was pending, certain negotiations for settlement were had between appellee on the one hand, and appellant and certain other parties, who were also liable to appellee on their covenants as remote grantors of said premises, on the other, which resulted in an agreement by which said remote grantors severally agreed to pay, and did pay, appellee certain sums of money. There is evidence tending to show that appellant also on his part agreed with appellee that if she would dismiss her suit he would pay her \$200, and she brings this suit to recover that sum.

Fabbri v. Cunio.

Upon the trial in the Circuit Court, appellee proved that the original deed, executed in March, 1872, was at the time of the settlement with one of said remote grantors, handed to him, and that he and not appellee, controlled it. Upon this evidence appellee was permitted, against the objection of appellant, to read in evidence the record of said deed. This, we think, was error.

Before appellee was entitled to read in evidence said record, it was incumbent on her to prove by her own oath, or that of her agent or attorney, that the original deed was lost or not in her power, and that to the best of her knowledge said original was not intentionally destroyed, or in any manner disposed of for the purpose of introducing a copy thereof in place of the original. R. S. 1874, Chap. 30, Secs. 35 and 36.

The testimony offered manifestly came short of laying a proper foundation for the introduction in evidence of this record. Even though the deed had been handed to and was under the control of a third party, it does not follow that it was not within her power. So far as appears, she might have obtained it on request or compelled its production by a *subpœna duces tecum*. Nor was it made to appear that the original was not placed in the hands of a third party for the purpose of introducing a copy. This proof should have been required before admitting the record in evidence.

The further point is made by appellant that the suit was prematurely brought. Appellee's own testimony of the agreement between her and appellant, as appears by the record, was as follows: "It was a part of the agreement between me and Fabbri that I was to dismiss the suit if he would pay me \$200. I had to dismiss the suit. He told me to dismiss the suit and he would pay me \$200."

According to this testimony the dismissal of the suit by appellee would seem to have been made a condition precedent to the payment of the money by appellant. This suit was commenced before the justice of the peace for the recovery of said money, April 21st, 1876, and the order dismissing said suit seems to have been entered April 26th, 1876. It is true, appellee testifies that she dismissed her suit in the morning, and

Phillips v. Phillips.

sued appellant in the afternoon of the same day. In this she is clearly disputed by the record, and as the trial of her suit before the justice of the peace took place April 26th, 1876, it is to be presumed she had reference in her testimony to the trial, and not to the issuing of summons, when she speaks of the time she "sued" appellant.

Upon the trial there was a considerable conflict of testimony as to the terms of the agreement between appellant and appellee in relation to the payment of this \$200. Appellant's testimony tends to show that this money was to be paid for an entirely different consideration from that sworn to by appellee, and that such payment was to be made upon certain conditions which had not happened.

As this cause must be remanded for a new trial, we forbear to express any opinion as to the preponderance of the evidence on these questions, but for the errors above pointed out the judgment must be reversed and the cause remanded.

Reversed and remanded.

CLARISSA B. PHILLIPS

v.

ALONZO PHILLIPS.

1 245
171 186

1. ADULTERY—CONDONATION.—In a suit for divorce on the ground of adultery, condonation of the adulterous act will not be inferred from the fact of subsequent cohabitation, where it appears that the wife at the time of such cohabitation had no knowledge that her husband had committed adultery. To establish a condonation, knowledge of the crime must be clearly and distinctly proved.

2. CONDONATION OF ACTS OF CRUELTY.—The offenses of adultery and extreme cruelty are essentially different in their nature, and the same circumstances, as respects condonation, cannot be equally applicable to both; and cohabitation, after acts of extreme and repeated cruelty, is not a bar to a divorce for that cause.

APPEAL from the Circuit Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

Phillips v. Phillips.

Mr. EGBERT JAMIESON, for appellant; upon the point that cohabitation was not a condonation of acts of cruelty, cited *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773; *Reese v. Reese*, 23 Ala. 785; *Davis v. Davis*, 19 Ill. 334; *Wood v. Wood*, 2 Paige, 108; *Angle v. Angle*, 1 Robertson, 634; *Perkins v. Perkins*, 6 Mass. 69; *Hollister v. Hollister*, 9 Barr, 449.

That there can be no condonation of adultery without knowledge of the offense: 2 Bishop on Marriage and Div. § 70; *Davis v. Davis*, 19 Ill. 334; *Greenhill v. Ford*, 1 Shaw's Appl. Cas. 435; 1 Frasher's Dom. Rel. 668; 2 Greenl. Ev. § 54; *Ellis v. Ellis*, 4 Swab. & T. 154; *Hoffmin v. Hoffmin*, 7 Paige, 60; *D'Aguilar v. D'Aguilar*, 1 Hag. Ec. 773; *Dempster v. Dempster*, 2 Swab. & T. 438.

Mr. J. R. CUSTER, for appellee.

MURPHY, P. J. This was a bill in chancery filed in the Circuit Court of Cook county, to the May term, 1877, by appellant, Clarissa B. Phillips, against her husband, Alonzo Phillips, for divorce.

By the bill the defendant is charged with the two offenses of adultery and extreme and repeated cruelty, either of which, under the statutes of this State, is a ground for a divorce. The allegations of the bill are that for the period of five or six years preceding their final separation, the defendant gave himself up to adulterous and licentious practices, and committed the crime of adultery with various persons at divers times and places, in some instances giving the names of the parties with whom he committed such adultery, and charged that in other instances he committed such offenses with persons to the complainant unknown. That during all the time aforesaid the defendant was guilty of extreme and repeated cruelty to her, by violently beating, bruising, pounding and maltreating her in various ways in said bill specified. To this bill the defendant answered, denying generally and specifically each and every allegation thereof? to which a replication was filed, and proof taken; and upon the hearing, the court below dismissed the bill, and decreed for the defendant, from which decree the

Phillips v. Phillips.

complainant prayed an appeal to this court, and brings the record here, and asks a reversal upon the ground that the court erred, first, in dismissing appellant's bill for want of equity; secondly, the court erred in not finding a decree in favor of appellant, and against appellee. It is insisted by appellee, first, that the proof does not sustain the charges in said bill; and second, that if they do, the offenses charged have been condoned, and we infer that to be the view taken by the court below; that notwithstanding the offenses charged had been established by the proof, still they have been condoned by the act of the complainant, and for that reason dismissed her bill.

This presents the question—and we think it the only question in the record—of whether the complainant has done any act which justifies the inference in law of condonation of these offenses thus established. Upon that question the following stipulation, filed in this Court, and signed by the counsel respectively, is material:

“It is hereby stipulated and agreed, first, that the bill of complaint charges appellee with having committed the offenses of adultery and cruelty, and that the court below found in its decree that said charges were fully and completely established by the proofs; second, that the court below also found that said offenses so proven had been condoned by appellant, and that such finding was based upon the fact that appellant and appellee had cohabited together at a hotel in Chicago; that such single act of cohabitation, the court below held, constituted a condonation of said offenses so proven, and thereupon dismissed the bill for want of equity.”

“Third, there is no proof showing that appellant knew of the appellee's adulterous practices at the time she cohabited with him at the hotel aforesaid; further, that the sole and only question presented to this Honorable Court by the record in the case is, where complainant files her bill for divorce on the ground of adultery and cruelty, and by proper and competent proof establishes such charges, will a single act of cohabitation, occurring a few days prior to separation, work a condonement of such offenses?” This opens for discussion the question of

Phillips v. Phillips.

condonation as an inference of law from overt acts of the complainant. It is claimed that if the act of cohabitation, after his guilt, shall so be held as an inference or presumption of law to have condoned his offenses, this may or may not be so, depending upon a certain other question connected with it, as a principle vital to the ends of justice and fairness between parties, which is the question of whether at the time she did these acts from which a condonation is claimed, she was in possession of a knowledge of his guilty conduct, for on principle it would seem inevitable that she could not be held to have condoned or forgiven an offense which, at the time, she was ignorant of his having committed.

By the stipulation; clause third, we infer that at the time of the alleged cohabitation she was ignorant of his adulterous practices, and that so far as that particular charge against him is concerned, she could not be held to have condoned it, for the obvious reason she was ignorant of his guilt. As to the allegation of extreme and repeated cruelty, it is otherwise. She of course knew to her sorrow of the existence of those wrongs which had been so frequently inflicted upon her, as is shown by the record. It will be seen by the stipulation, a knowledge of his adulterous conduct must have come to her knowledge after the act of cohabitation alleged. The precise time does not appear, either from the record or stipulation, but it is wholly unimportant when, if since the act of cohabitation which, it is claimed, amounts in law to condonation of such offenses. In order to establish condonation by her, knowledge of the crime must be clearly brought home to her by distinct proof: 2nd Vol. Greenleaf's Evidence, sections 53 and 54. The principle is elementary and stands to reason; that without a full knowledge on her part at the time of the alleged condonation of all the facts and circumstances connected with his guilty conduct, no inference of condonation can be drawn from any act of hers. In the case of *Davis v. Davis*, 19 Ill. 334, this doctrine is re-stated, and re-affirmed in the case of *Farnham v. Farnham*, 73 Ill. 500.

Thus it will be seen that the charge of adultery is sustained, and the defense thereto of condonation has failed for the reasons

Phillips v. Phillips.

above stated, and upon that issue alone the complainant was entitled to a decreë for a divorce. Leaving out of sight for the time being the charge of adultery, it only remains to be considered whether the act of cohabitation at the hotel in Chicago, as above stated, was such an act as in law warrants the inference or presumption of condonation of his offenses by way of extreme and repeated cruelty. The two offenses of adultery and extreme and repeated cruelty are essentially different in their nature, and the same considerations cannot be equally applicable to both.

As respects condonation of cruelty, in the case of *Gardner v. Gardner*, 2 Gray, 434, the court held that the cohabitation for a single night immediately succeeding a series of acts of cruelty by the husband towards his wife, is not such a condonation as will bar a bill by the wife for a divorce from bed and board for extreme cruelty, if the husband, by the violence of his subsequent conduct causes a reasonable apprehension in her mind that she can no longer cohabit with him without imminent danger of suffering extreme cruelty from his assaults, then such subsequent violent conduct revives the right of the wife to proceed for the original cause of divorce, and effectually bars the defense of condonation. In the case of *Perkins v. Perkins*, 6 Mass. 68, which was a bill for divorce *a mensa et thoro*, for the extreme cruelty of the respondent, the evidence showed for a long course of time the respondent had made use of brutal language, and violent threats of personal abuse; and that about six years since he unjustifiably assaulted and beat her, after which fact the parties continued to reside together, the respondent still continuing to use the same abusive and threatening language. It was suggested by the respondent that although the evidence of personal violence used by him might have furnished sufficient cause for divorce if seasonably presented, yet the libellant, by her evidence of cohabitation with him, had remitted her claim to a divorce, and had pardoned the outrage.

The courts say, in case of an application for a divorce *a vinculo* for adultery, when after a knowledge of the offense committed the libellant has lived with the offending party, we

Phillips v. Phillips.

have always refused to grant the divorce; but this rule cannot be applied to a case of the kind now before us. The patience and forbearance of the wife, and her endeavor to prevent the scandal of an open rupture, ought not to operate to her prejudice.

In *Hollister v. Hollister*, 9 Barr, the court in discussing this question, say that "cohabitation after abuse is not a bar to a divorce for that cause; the distinction between the two cases—adultery and cruelty—seems to be founded upon a just conception of the conjugal relation. With regard to the personal indignities and barbarous treatment, nothing but the devoted fondness of a female submissive in distress, could induce her to remain after the infliction of personal indignities, with the hope of softening her husband's heart. It is the duty of a wife to forbear long, and to endeavor to reclaim her husband. If she fail—her kindness, her tears and her sorrows are all of no effect—shall the very virtue of her patience and fidelity deprive her of her only remedy which the law holds out to a broken peace and ruined hope?" The relation to the domestic circle of the wife and husband are essentially different. She has less opportunity to look after and guard his honor than he has of hers. Upon reason, therefore, founded in the conjugal relation, the difference in the duties respectively required to the domestic establishment, a less stringent rule is held against her than against him, so far as inferences of condonation are concerned from the overt acts of the parties respectively. In this case the record shows that the defendant for years, and in instances too numerous to mention, continued a system of extreme and repeated cruelty and torture to the complainant, which are so horrible to contemplate that it seems to us a wonder that the court below should have felt it its duty to deny her the relief she asked. The testimony in the case portrays him in a character so loathsome and despicable, so utterly wanting in redeeming characteristics as a husband and father, that it is difficult to find fitting terms to characterize him. That she should have borne so long such cruelties and indignities, is to us a wonder, and from the peculiar dependence of the wife upon the husband, arising out of their peculiar relation to each other and the domestic circle, we

Harms v. Sullivan.

are inclined to the conclusion that by the simple act of cohabitation immediately prior to the filing of her bill, an inference of condonation of these brutish cruelties is unwarrantable. So in the light of these views, we think the court below erred in finding and decreeing that the complainant had by the one act of cohabitation immediately prior to the filing of this bill, and in ignorance of his adulterous conduct, condoned said offense, and for this error the decree of the court below is reversed, and the cause remanded, with directions to that court to enter a decree of divorce for the appellant, pursuant to the prayer of her bill.

Decree reversed and cause remanded.

HENRY HARMS

v.

DANIEL SULLIVAN.

1. INJURY TO WORKMAN BY NEGLIGENCE OF FELLOW WORKMEN—ORDERS BY SUPERINTENDENT—INSTRUCTION TO JURY.—An instruction that the orders of a superintendent, when given in the presence and hearing of his principal or employer, are to be considered by the other employees as the orders of his principal, if no objection or dissent is made at the time the orders are given, is erroneous, its effect being to relieve the foreman of all responsibility, and make the contractor responsible for orders he never gave, and had not the necessary knowledge about the peculiar kind of work, or the condition of its progress, to judge of their correctness.

2. INSTRUCTION AS TO NEGLIGENCE.—A further instruction, "that if the jury find, from the evidence, that the defendant was guilty of gross negligence, the plaintiff will be entitled to recover, even though he may have been guilty of a comparatively slight degree of negligence," is erroneous. It tells the jury that if they find the defendant was guilty of gross negligence, the plaintiff would be entitled to recover, whether such negligence contributed to the injury complained of or not.

3. PROVIDING SUITABLE MACHINERY—LIABILITY OF CONTRACTOR.—Where a contractor engaged in the erection of a building has provided suitable and safe machinery for the use of his employees, and such machinery is on hand and can be used, and any of the employees, through negligence or error in judgment, select and use machinery of insufficient size and strength, whereby an injury results to a co-employee, the contractor is not liable for such negligence or error in judgment, provided the employees were persons of adequate skill, and careful, prudent persons.

Harms v. Sullivan.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Messrs. FORRESTER & BEEM, for appellant; insisted that an employer is not liable for injuries to an employee resulting from the negligence of his co-employees in the same line of duty, and cited *Gartland v. Toledo, W. & W. R. R. Co.* 67 Ill. 498; *Connor v. Ill. Cent. R. R. Co.* 15 Ill. 550; *Ill. Cent. R. R. Co. v. Cox*, 21 Ill. 20; *C. & A. R. R. Co. v. Murphy*, 53 Ill. 339; *C. B. & Q. R. R. Co. v. Gregory*, 58 Ill. 226; *C. C. & I. C. R'y Co. v. Troesch*, 68 Ill. 548.

Mr. ALBERT W. BRICKWOOD, for appellee; that a master must provide proper and sufficient machinery, and use all reasonable precaution for the safety of his servants, cited *Gibson v. P. P. R. R. Co.* 46 Mo. 163; *Fairbank v. Haentzche*, 73 Ill. 236; *Perry v. Ricketts*, 55 Ill. 234; *C. & N. W. R. R. Co. v. Sweet*, 45 Ill. 197; *Wright v. N. Y. Cent. R. R. Co.* 25 N. Y. 565.

That where a master commands a thing to be done, and an injury results from the want of care in the servant while performing the order, the master is liable in trespass: *Douglass v. Stevens*, 18 Mo. 362.

That the act of an agent, done without authority, may be considered as ratified if the principal, having full knowledge of the facts, fails to dissent: *Ward v. Williams*, 26 Ill. 447.

MURPHY, P. J. This was an action of trespass on the case, commenced in the Circuit Court of Cook county by the appellee against the appellant, to recover damages as alleged, resulting from an injury received by the appellee on the 9th day of June, 1877, whilst in the employ of the appellant in the capacity of a stone-setter. In the declaration it is alleged that the appellant was guilty of negligence in providing defective and insufficient tools and implements for the proper carrying on of the work, which appellee was employed to do, and permitting his other employees to be guilty of a lack of due care and regard for the safety of the appellee, by means of which he was injured.

Harms v. Sullivan.

The defendant pleaded not guilty, and upon a trial in the court below it resulted in a verdict and judgment against appellant for \$500.00, from which judgment he prayed an appeal to this court, and assigns for error the giving by the court of the appellee's instructions; and secondly, that the court erred in refusing to give appellant's fourth instruction asked by him to be given. The 3d, 4th, 5th and 6th assignment of errors involve a discussion of the facts of the case, and the weight or preponderance of the testimony. From the view taken by the court of the case it will be necessary to submit it to another jury, and for that reason we forbear the expression of any opinion upon the facts which would be calculated to influence the deliberations of a jury on that trial. It is our purpose therefore, to consider the facts only so far as they may be necessary to a consideration of the 4th and 6th instruction, in the series of instructions given by the Court to the jury at the instance of the appellee, and the 4th instruction in the series asked for by the appellant, which was refused by the Court. It appears that the appellant was the contractor to build the foundation of the Cook county court house; that he is not himself a stone mason, and for the purpose of constructing said foundation walls in a workmanlike manner, employed Charles Walker and one Phenix, careful and competent men, skilled in the business, to superintend the setting of the stone of which said foundation is constructed; that they had charge of and were personally superintending the placing in said work a stone by the use of a derrick and other proper implements thereto attached, at the time the injury complained of took place. It appears that appellant was on the ground at the time, and in the vicinity of the men thus employed, but just where on the grounds he was, or what he was doing at the moment, and whether he had given any directions in respect to the placing of said stone, is a question in respect to which there is a conflict in the testimony, but it will not be necessary for us to discuss that question. The work of setting the stone in the foundation walls was of such a character as to require experienced and skilled laborers to perform; common laborers and men not trained to it could no more perform such work in

Harms v. Sullivan.

a proper manner than they could lay brick in an outside wall, or do a good job of plastering. This being the case, and it not being pretended that the appellant himself understood how these stone should be set in the walls, he employed for that purpose, Walker and Phenix, who are shown to be experienced and competent men to superintend this work, who, at the time the injury occurred, were actually engaged in the performance of their duty in that respect.

Putting out of sight for the time being the question of the appellant's liability for injuries to the appellee, resulting from the negligence of his co-employees in the same line of duty, the more pertinent question for us to consider is, can he be made liable in the way contemplated by the 4th instruction given to the jury at the instance of the appellee, which is as follows:

"4th. The jury are instructed that the orders of a foreman or superintendent when given in the presence and hearing of his principal or employer, are to be considered by the other employees as the orders of his principal or employer, if no objection or dissent is made at the time the orders are given."

This instruction is unsupported by any authorities to which we have been referred, or which we have been able to find. It tells the jury that if the appellant was present and in hearing of any orders or direction given by Walker or Phenix about the work of placing said stone, that at once it became the order of the appellant, and that all the other employees must understand such orders as emanating from him, and as a consequence his foreman is relieved of all responsibility, and he is made responsible for orders he never gave, and has not the necessary knowledge about the peculiar kind of work, or the status of its progress at the time, to judge of their propriety or correctness.

This seems to us indefensible as a proposition of law.

Suppose a man wants a piece of work done which (as in this case) he does not pretend to understand how to do, and employs men skilled in the business of doing such work, who embark in the undertaking. The proprietor very naturally, and properly feeling an interest in his work, happens to go about his premises and men for the purpose of observing its progress, and looks on, and whilst he happens to be thus present, the

superintendent gives orders about the work as to the manner in which it shall be conducted, is it to be said that these orders emanate from him with all the responsibility which perchance may attach to him, unless he immediately interferes and protests against them? We think most certainly not; and still that is the fair import of the instruction. Although the appellant be ignorant of the trade or business of setting stone, and of any and all antecedent orders given by the superintendent, if this instruction is the law, he must be ignorant of both at his peril, if he happens to go about where his work is being performed.

The court also gave the following instruction, at the instance of the appellee :

“ 6th. If the jury find, from the evidence, that the defendant was guilty of gross negligence, the plaintiff will be entitled to recover, even though he may have been guilty of a comparatively slight degree of negligence.”

This instruction, it will be seen, tells the jury, that if they found the appellant was guilty of gross negligence, the appellee would be entitled to recover, whether such negligence contributed to the injury complained of or not; which we think is not the law. The giving of these instructions was error.

The appellant requested the court to give to the jury the following instruction :

“ 4th. The jury are instructed that even if they believe from the evidence that the accident in this case resulted from the lewises or pins not being sufficiently large or strong to be safely used in the hoisting and supporting of the stone in question, yet if they further believe from the evidence that the defendant had provided other pairs of pins of sufficient size and strength, which were on hand and could have been used, but that any of the fellow employees of the plaintiff, through negligence or error of judgment, selected and used pins of insufficient size and strength, whereby the injury complained of resulted to the plaintiff, then the defendant is not liable for such negligence or error of judgment, provided the jury further believe from the evidence that such fellow employees were persons of adequate skill, and were careful and prudent persons.”

Which the court refused to do. We have examined this

Heath et al. v. Jones.

instruction, and are of the opinion that it correctly embraces the law of the case on the question to which it refers, and was pertinent to the issue on trial, and should have been given.

For these errors the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

MONROE HEATH ET AL.

V.

FERNANDO JONES.

EVIDENCE—CONFLICTING TESTIMONY—SUBMITTING QUESTION TO THE JURY.—Appellee claimed to recover for a certain quantity of brick sold. Appellants introduced testimony tending to show that the brick for which appellee claimed payment were thrown in by way of a sale of land, and were to be allowed to appellants without other charge than the consideration paid for the land purchased by them. Under such a state of the evidence, it was the right of appellants to have the question, as to whether the brick were in fact thrown in as a part of the purchase of the real estate, submitted to the jury, and an instruction upon that point asked by appellants, was improperly refused.

APPEAL from the Superior Court of Cook county, the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. PLINY B. SMITH, for appellants.

Mr. R. W. SMITH, for appellee; contending that the conversation testified to by appellants did not show a completed contract, cited *O'Keefe v. Kellogg*, 15 Ill. 347; *Schneider v. Westerman*, 25 Ill. 514; *Low v. Freeman*, 12 Ill. 467; *Rupley v. Daggett*, 74 Ill. 351.

MURPHY, P. J. This was an action of assumpsit commenced in the Superior Court of Cook county, to the September term, 1875, by the appellee against the appellants, to recover on an open account, an itemized copy of which was filed with the declaration, aggregating \$6,618.42.

The defenses relied upon by appellants were first, the plea of non-assumpsit; second, plea of Statute of Limitations. Upon the trial in the court below upon these issues, the appellee appears to have substantially abandoned all of the items of said account except one: which was for a quantity of Philadelphia pressed brick, 7,500 at \$60 per thousand, equaling \$450.00. The trial resulted in a judgment against the appellants for that amount, who prayed an appeal to this court and assign several errors, only one of which will be necessary for us to consider. The second assignment of errors is that the court erred in refusing to give the instructions requested by the defendants. The defendants requested the court to instruct the jury as follows—that is to say:

4th. The jury are instructed, that in order for the plaintiff to recover for the brick sued for in this suit, he must establish the sale of them as claimed by a preponderance of the testimony; and if upon the question of such sale the evidence is evenly balanced, then the plaintiff fails in this part of his case; and if from the evidence the jury believe that the brick were thrown in in a purchase of land by the defendants from the plaintiff without other charge than the consideration in the sale of the land, the plaintiff cannot recover for such brick in this suit.

It appears that prior and up to the 13th day of August, 1870, appellee owned an interest in the premises known as Nos. 170 and 172 Randolph street, Chicago. That prior to that time said premises were leased to the appellants, who carried on business there. On that day the buildings on said premises were destroyed by fire.

It appears that immediately thereafter, appellants opened negotiations with appellee for the purchase of his interest in the lots, with a view to constructing thereon buildings for their future business purposes, which resulted in a sale and conveyance by the appellee of said premises to the appellants, who subsequently improved the same.

When the fire occurred, it appears that the appellee was stopping at Saratoga, New York, to which place the appellant Milligan immediately repaired for the purpose of negotiating

Heath et al. v. Jones.

a purchase of said lots, for and on behalf of the firm of Heath and Milligan, appellants. It appears that negotiations progressed there between appellee and said Milligan on behalf of the appellants for several days, which finally culminated in a sale of the premises as above stated. It is claimed by the appellants, that during this negotiation at Saratoga, it was agreed between appellee and said Milligan in behalf of appellants, that if Milligan would take the property on certain and specified terms, he, appellee, would throw in these brick now in controversy; and that having finally accepted and bought the lots, claim that the title to the brick passed also by virtue of this offer during such negotiation. Upon this question which, as we have observed, was the principal issue tried by the jury, there is a conflict of evidence in this case. The appellee claims that if any such proposition was ever made by him at Saratoga as claimed by appellants, it was not accepted then or at any other time, and that when subsequently the sale of the lots was made, it was not understood or agreed between the parties that the brick was to go with them; nor did they constitute any part of the consideration of such transaction. Appellants claim that the offer as testified to by Milligan as being made by appellee, was relied on by them, and that the same constituted a substantial part of the consideration of said real estate transaction, and that the title to the brick passed to them, and hence no recovery should be had for them in this suit. Under this state of the evidence we think it was the right of the appellants to have the question submitted to the jury, as to whether the brick in question were in fact thrown in and constituted a part of the purchase with the real estate purchased by appellants as above stated, or whether they were as claimed by appellee, sold to appellants in September, 1870, independent of the real estate deed. This is a question for the jury to determine. And in the light of these views we think the above instruction should have been given, and that it was error to refuse it, and for which error the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

Forrester v. Oliver et al.

ROSE A. FORRESTER, Executrix,

v.

JOHN OLIVER, Adm'r, ET AL.

1. SURVIVING PARTNER—STATUTE RELATING TO DUTIES OF.—The statute of Illinois, relating to the duties of a surviving partner in the management of the partnership estate, is but declaratory of what the law was before its enactment. It provides some additional remedies, but does not change the rights or duties of the parties, only the mode of performing them.

2. COMMON LAW RULE—SURVIVING PARTNER LIABLE FOR LOSSES.—A dissolution by death puts an end to the partnership from that time, whether the death be known or unknown. It terminates the power of the surviving partner to carry on the business, or to engage in new transactions, contracts or liabilities on account thereof; and it then becomes his duty to cease carrying on the business. If he continues the business, it is at his own risk, and he will be liable, at the option of the legal representative of the deceased partner, to account for the profits made, or to be charged with interest on the deceased partner's share of the surplus, besides bearing all losses.

3. RELATION OF SURVIVING PARTNER TO LEGAL REPRESENTATIVES OF DECEASED PARTNER.—On the death of a partner, the relation of trustee and *cestui que trust* is created; the surviving partner, as to the partnership estate, occupying the position of trustee, with the legal representatives of his deceased partner, on the one hand, and the creditors of the firm, on the other, that of *cestuis que trust*; the terms of the trust being that he will at once cease business in the name or on account of the late firm, and proceed without delay to close up the business, as provided by statute.

4. SURVIVING PARTNER CONTINUING BUSINESS—LIABILITY.—It appearing from the testimony in the case that the surviving partner, upon the death of his copartner, took no steps to close up the firm business, as required by statute, but on the contrary embarked in new enterprises in the firm name, with the firm capital; *held*, that this was a conversion, and he should be charged with whatever the interest of his deceased partner in the business was worth at the time of such conversion.

ERROR to the Circuit Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

Messrs. FORRESTER & BEEM, for plaintiff in error; upon the duty of a surviving partner to cease business and close up estate, and as to his liability, cited Story on Partnership, 343; Washburn v. Goodman, et al. 17 Pick. 519; Parsons on Partnership, 438; Booth v. Parks, Beatty's R. 449; Clement

Forrester v. Oliver et al.

v. Hall, DeGex & J. 186; Foulman v. Copeland, 2 Phil. Ch. 714; Lindley on Partnership, 1041; Gross' Stat. 829.

As to consent or agreement to continue the business: Kirkman v. Booth, 11 Beav. 273; Parsons on Partnership, 397.

That surviving partner is a trustee: Nelson v. Hayner, et al. 66 Ill. 487.

Messrs. GARDNER & SCHUYLER, for defendants in error; as to the duty of the surviving partner to settle the partnership estate, cited Nelson v. Hayner, et al. 66 Ill. 487; Laws 1869, 301, § 3.

As to liability of the surviving partner by continuing the business, and that the partnership has a limited continuance for certain purposes, cited Nelson v. Hayner, et al. 66 Ill. 487; Hutchinson v. Smith, 7 Paige Ch. 26; Evans v. Evans, 9 Paige's Ch. 178; Murray v. Mumford, 6 Cowen, 441; Tremper v. Conklin, 44 N. Y. 58; Betts v. June, 51 N. Y. 274; Washburn v. Goodman, et al. 17 Pick. 519; Lindley on Partnership, 830; Schenkel v. Dana, 118 Mass. 237; Gow on Partnership, 2d Ed. 253; Collyer on Partnership, 2d Ed. 130; Caldwell admr. v. Stillman, 1 Rawle, 212; Fereira v. Sayes, 5 Watts & Serg. 210; Cope v. Warner ex'r. 13 Serg. & Rawle, 411; Hebeston v. Johnson, 10 Barr. (Pa. St.) 124; Brown, Exr. v. Higginbotham, 5 Leigh, 683; Walker v. Goodrich, 16 Ill. 341; Smyth et al. v. Harvie et al. 31 Ill. 62; Mason v. Tiffany, 45 Ill. 392; Willett v. Blandford, 1 Hare, 253; Crawshay v. Collins, 15 Vesey, Jr. 218; *ex parte* Williams, 11 Vesey, Jr. 5; Moore v. Huntington, 17 Wall. 417.

MURPHY, P. J. This was a bill in Chancery, filed in the Circuit Court of Cook county, by the plaintiff in error, as executrix of the estate of Tunis Ryerson, late of said county, deceased, against the defendants in error, as administrator and administratrix of the estate of Peter Johnson, also late of said county, deceased, for an accounting between the two estates.

Upon a hearing of the cause, the court below dismissed the bill for want of equity, and the complainant brings the record

here on writ of error, and asks a reversal of said decree, and assigns for error: First—That the court erred in ordering that the net loss accruing from the fire should be charged to the firm of Ryerson and Johnson, and borne equally by the estates of the decedents, Ryerson and Johnson. Second—That the court erred in not charging the defendants with one half of the loss by the fire, and allowing the same to the complainant; Third—That the court erred in dismissing the bill of complainant.

It appears that Tunis Ryerson, of whose estate the plaintiff in error was executrix, and Peter Johnson, of whose estate the defendants in error are administrator and administratrix, had for several years carried on "the business of a lumber yard," in the city of Chicago, as copartners, under the firm name of Ryerson and Johnson. That on the 11th day of July, 1871, said Ryerson departed this life testate, and that said Johnson, as surviving partner, retained the possession and control of all the property and assets of the firm, amounting in value to over one hundred thousand dollars, including a large stock of lumber on hand, and used the same with the other means of the firm, in continuing the business for his own profit and benefit, but without consulting the plaintiff in error.

That in the spring of the year, 1872, Johnson departed this life without having accounted with the plaintiff. It did not appear that Johnson as surviving partner had filed any inventory in court of the property and assets of the firm, as required by the statute. It also appears that the entire stock of lumber and "other property in the yard," was destroyed without any fault or negligence of any person, by the great fire in Chicago, of October 8 and 9th, 1871, and that the value of the whole property so destroyed was \$49,054.69, and that there was realized from insurance from solvent companies the sum of \$5,272.50, leaving a net loss of \$43,728.19.

It appears that all the property and assets of the late firm of Ryerson and Johnson, not destroyed by the fire, had been accounted for; their debts and liabilities all paid, and the surplus divided. That there is nothing in controversy between the two estates except the value of the lumber and other property

Forrester v. Oliver et al.

destroyed by the fire, as above stated. It appears that the late firm of Ryerson and Johnson were joint owners with one Esau Tarrant, of a steam sawmill at Muskegon, in the state of Michigan, and were co-partners with him under the firm name of Esau Tarrant & Co., for the purpose of running and operating the same.

That at the time of Ryerson's decease, said last mentioned firm had on hand a large stock of logs belonging to said firm, by it to be sawed, and the lumber disposed of; and that by an agreement with Esau Tarrant & Co., Ryerson and Johnson were to sell the lumber sawed by the former, as it should be shipped to them for that purpose at Chicago; that the partnership between Ryerson and Johnson and Esau Tarrant, was formed by written articles of co-partnership, bearing date November 8th, 1870, and was to continue one year from that date, which was executed in the firm name of Ryerson and Johnson, for the purpose as therein stated, of buying logs, manufacture of lumber, lath &c., at the city of Muskegon, State of Michigan, and that Ryerson and Johnson had paid in as stock the sum of \$15,000.00, and said Tarrant a like sum, to be used in common between them, for the support and management of said business, to their mutual benefit and advantage. Upon these facts it is insisted by the plaintiff in error, that as matter of law, the estate of said Johnson is liable to the estate of said Ryerson, for the full value of one-half of the firm assets remaining in Johnson's hands after the payment of all the partnership liabilities, and which were destroyed by the great fire of 1871, amounting, as is claimed by the plaintiff in error, to one-half of \$43,782.19, the value of the lumber and other partnership property destroyed by the fire, which is \$21,891.09. This raises the question as to what are the legal rights of a surviving partner touching the partnership assets, and what is his duty to the legal representatives of his deceased partner in that regard. By the statute of 1869, in respect to the settlement of estates of deceased partners, Gross' Statute 829, it is provided as follows: Section 1st. "That surviving partners shall make a complete inventory of the estate of the co-partnership, and also a complete list of the liabilities of the

Forrester v. Oliver et al.

firm, and to cause the estate to be appraised in the same manner as the undivided property of deceased persons to the Probate Court."

Section 2d. "And return under oath such inventory list and appraisement, within ten days after the death of the co-partner, to the County or Circuit Court of the county of which deceased was a resident at the time of his death; upon neglect so to do, to be liable to attachment, after citation." Section 3d. "Surviving partners shall have the right to continue in possession of the effects of the partnership, and settle its business, but shall proceed thereto without delay, and shall account with the executor or administrator, and pay over such balance as may from time to time be payable to him in right of his testator or intestate. And, upon application of the executor to the County or Circuit Court, may, whenever it shall appear necessary, order the survivor to account as to the question of the rights of a surviving partner, and his duties to the legal representatives of his deceased partner." We think this statute is but declaratory of what the law was before its enactment. It provides some additional remedies which did not exist prior thereto, but does not attempt to change the rights or duty of the parties, changing only the mode of performance. At section 343, of Story on Partnership, the learned author says: "We have already seen that a dissolution by death puts an end to the partnership from the time of the occurrence of that event, whether known or unknown, or whether third persons have or have not notice thereof—so that it completely puts an end to the power and authority of the surviving partners to carry on, for the time, the partnership trade or business, or to engage in new transactions, or contracts, or liabilities, on account thereof. It is, therefore, the duty of the surviving partners henceforth to cease altogether from carrying on the trade or business thereof, and if they act otherwise, and continue the trade or business, it is at their own risk, and they will be liable at the option of the representatives of the deceased partner, to account for the profits made thereby, or to be charged with interest on the deceased partner's share of the surplus, besides bearing all losses." Therefore, by the death

Forrester v. Oliver et al.

of Mr. Ryerson, *ipso facto*, the dissolution of the co-partnership was complete, and the relation of trustee and *cestui que trust* established. Mr. Johnson, from that moment occupying the equitable attitude of trustee with the creditors of the late firm of Ryerson and Johnson, on the one hand, and the legal representative of the deceased partner on the other, as *cestuis que trust*. The terms of the trust being fixed, determined and declared by the law, namely: that he at once suspend all operations of business in the name of, or on account of the late firm, and proceed without delay to close up said business, in manner and form provided by the statute, converting as fast as prudence and good judgment will permit, the partnership assets into cash, at least so far as to enable him first, to pay and discharge all legal liabilities of the firm; and, secondly, account to the legal representatives of his deceased partner, according to their equitable interest in the remaining partnership assets, and thus close up the partnership business. It is urged by the defendants in error that Mr. Johnson was entitled to a reasonable time in which to wind up said business, and from the decease of Mr. Ryerson, on the 11th of July, up to the time of the fire, on the 8th and 9th of October, 1871, was not sufficient time for such purpose, and that therefore his estate should not be charged with the loss of the Ryerson estate in said lumber. There might be force in this position if Mr. Johnson had taken any steps under the law to close up said business after the decease of Mr. Ryerson, before the fire, or in apt time; but there is no evidence at all that he ever did the least act with that object in view. It will be observed that by the second section of the above statute, it was made the duty of Mr. Johnson, within ten days from the decease of Mr. Ryerson to return under oath an inventory and appraisement of the partnership assets to the County or Circuit Court, as the first step in the direction of closing up said business. This and all other acts looking to the closing up of said business, he entirely failed to do. We think it is obvious that he did not intend to close up the business at all, but on the contrary, to continue the same for his own benefit; and for that purpose, embarked the entire capital of the late firm in new adventures,

Forrester v. Oliver et al.

purchasing between the date of the decease of his partner and the great fire, five millions of feet of green lumber for the business, and giving every outward evidence of his intention to carry on the business indefinitely for his own benefit, using for that purpose the capital which equitably belonged to the legal representatives of his deceased partner. It is urged by the defendants, that the firm having entered into a continuing contract of partnership with Esau Tarrant, and the lease for the yards where they had done business, constituted a justification of Mr. Johnson to continue the business. A large number of authorities are referred to to support this view. We have examined these authorities, and do not think they sustain the right of Mr. Johnson to continue the business as he did. They are not in conflict with the elementary doctrine that the surviving partner, as trustee, invested with the legal title to all the partnership property, has the power, and it becomes his duty, to proceed at once and close up the partnership business of every kind, including as well its out-standing obligations in the nature of executory contracts; as others, they are all partnership contracts, and are alike affected by its dissolution.

It is not claimed that the plaintiff in error consented to this unlawful continuation of the business, and it was not necessary for her to appear and object. *Remick's Administrator v. Ewing et al.* 42 Ill. 342. Johnson was bound to know the law, and obey it. He failed to do so at his peril. In the case of *Nelson v. Hayner*, 66 Ill. 487, the court holds this same doctrine. We think that when Mr. Johnson failed to take the steps required of him by the law, looking to closing and settling up of the partnership business, but embarked the entire capital in a business on his own account and for his own benefit, it is a substantial conversion to his own use of the entire capital belonging to the legal representative of his deceased partner so in his hands, and he should be charged with whatever the property so converted was fairly worth in the market at the time of such conversion or appropriation. It appears that the value of the partnership property destroyed by the fire was \$49,054.69; that there was received from the insurance thereon \$5,272.50, leaving a net loss of \$43,782.19. It

Lill et al. v. Brant.

appears by the agreement of the parties that the above figures represent the fair market value of the property destroyed. The rule announced in the case of *Moore v. Huntington*, 17 Wall, 417, is inapplicable in this case, for the reason as we have shown, that Mr. Johnson unlawfully so used and employed the property which equitably belonged to the plaintiff in error, as to amount practically to a wrongful conversion of the same, and therefore we are of the opinion that his estate is chargeable with it at its fair cash value, which appears to be \$21,891.09, being one-half of the net loss. We think the court erred in dismissing the bill and not entering a decree for such amount.

For these errors the decree of the court below is reversed, and a decree entered in this court for the plaintiff in error for the above sum of \$21,891.09 against the defendants in error, to be paid in due course of administration.

Decree reversed.

JOHN LILL ET AL. Executors,

v.

N. B. BRANT, Administrator.

1. CONVEYANCE TO PAY DEBTS—STATUTE OF LIMITATIONS.—The testimony showed that Horan, appellee's intestate, conveyed to Lill certain personal property to pay a claim of certain persons against Horan. *Held*, that the cause of action as shown was the breach of an express contract, and it appearing that the claim was fully paid by Lill in 1865, the cause of action against him for any surplus after such payment arose then, and this action is barred by the Statute of Limitations.

2. PROOF—VARIANCE.—It being expressly stated to be a conveyance of property for certain declared trusts, in consideration of certain indebtedness of the grantor to the grantee, such consideration becomes material to be shown, and a variance in this respect between the declaration and proof is fatal.

3. COUNTY COURT JURISDICTION—ON APPEAL.—The claim declared upon was a conveyance of property to be held, used and disposed of for the benefit of the creditors of the grantor. The grantee then, according to the declaration, became a trustee, and the property and its proceeds a trust fund,

Lill et al. v. Brant.

which the *cestui que trust* alone could pursue, and only in a court of equity. The claim as declared upon, was not within the jurisdiction of the county court, and the Circuit Court on appeal can only take the same jurisdiction as the court below.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

MESSRS. MONTGOMERY & WATERMAN, and Mr. SANFORD B. PERRY, for appellants; cited upon the question of variance: Brock v. Slaten, 82 Ill. 282.

The jurisdiction of county and circuit courts: Propst v. Meadows, 13 Ill. 168; Von Kettler v. Johnson, 57 Ill. 119; Moffit v. Moffit, 69 Ill. 641; Barnett v. Wolf, 70 Ill. 76; People v. Gray, 72 Ill. 343; Bostwick v. Skinner, 80 Ill. 147; Pahlman v. Graves, 26 Ill. 405; Rev. St. 339, § 69; Const. 1870, Art. VI. §§ 12, 18.

The character of the transaction was that of a special contract: Doyle v. Murphy, 22 Ill. 502; Steele v. Clark, 77 Ill. 471; Albrecht v. Wolf, 58 Ill. 186.

That the action was barred by the Statute of Limitations: Angell on Limitations, Ch. 16, § 166; Governor v. Woodworth, 63 Ill. 254; Hayward v. Gunn, 82 Ill. 385.

Upon the creation of a trust: Gross St. Ch. 44, § 5; Perry on Trusts, §§ 77-84; Hovey v. Holcomb, 11 Ill. 660; Perry v. McHenry, 13 Ill. 227; Seaman v. Cook, 14 Ill. 501; Lantry v. Lantry, 51 Ill. 458; Rogers v. Simmons, 55 Ill. 76; Walter v. Klock, 55 Ill. 362; People v. Lott, 36 Ill. 447.

MESSRS. BRANDT & HOFFMAN, for appellee; contending that a conveyance of real estate, though absolute in terms, if intended by the parties to be security for a debt, is in law and equity a mortgage only, cited Delahay v. McConnell, 4 Scam. 157; Miller v. Thomas, 14 Ill. 428; Tillson v. Moulton, 23 Ill. 648; Klock v. Walter, 70 Ill. 416; Strong v. Shea, 83 Ill. 575.

Upon the question of jurisdiction of the county court to adjudicate upon the claim in suit: Moore v. Rogers, 19 Ill. 347; Dixon v. Buell, 21 Ill. 203.

Lill et al. v. Brant.

PLEASANTS, J. On the 14th of May, 1876, appellee filed in the County Court a claim against the estate of William Lill, setting forth in substance that about June 1, 1865, Horan was the owner of a liquor and billiard saloon, with the stock, fixtures and furniture thereof, in the city of Chicago, of the value of \$12,000, and of two lots described, and was indebted to Lill for goods sold and delivered in the sum of \$3,500, and to others not named, in the aggregate sum of \$15,000; that he then conveyed to said Lill all of said property, "upon the understanding and agreement between said Horan and said Lill that from the proceeds of said property said Lill should pay the debt due as aforesaid from said Horan to said Lill, and the balance of the proceeds of said property said Lill agreed with said Horan to pay to other creditors of said Horan or to said Horan himself;" that Lill thereupon converted to his own use the said personal property, and held the said lots until April, 1875, when he sold them for \$9,450, and that he never accounted for any of the proceeds of said property, either to said Horan or to any of his creditors; by reason whereof, said Lill in his lifetime became, and his estate now is, indebted to the estate of said Horan for the use of his creditors and heirs, for the value of the personal property so converted less the debt so due to himself, with interest on the balance from June 1, 1865, and for the proceeds of the lots so sold, with interest thereon from April, 1875, less the taxes and improvements and the expenses of the sale and commissions, credited at \$3,000, leaving a balance alleged to be due of \$21,176.62.

The claim was disallowed by the County Court, but upon a trial in the Circuit Court on appeal, a verdict was returned in favor of the plaintiff for \$9,000, on which, after motions for a new trial and in arrest overruled, judgment was entered. Defendants appealed to this Court, and now assign for error the overruling of their several motions to dismiss the claim, to set aside the verdict and grant a new trial, and to arrest the judgment, and the entering of judgment for the plaintiff upon the verdict.

The testimony shows that said Horan and one Charles Dennehey carried on the saloon as co-partners for a year prior to

January, 1864, when they dissolved—Horan retaining the assets, assuming the liabilities and continuing the business. They owed Paris & Allen, of New York, about \$5,000, and others, including their lessor for rent, and Horan, with Lill as security, executed a bond to Dennehey to indemnify him against these claims. He afterwards became indebted to Brant & Co., of Chicago, and to John Black, of Milwaukee, for liquors, in about the sum of \$2,500, and in February, 1865, transferred his interest in the saloon stock and property to said Lill.

The terms on which this transfer was made are not clearly shown. Dennehey was present, but although called by appellants as a witness on the trial he was not asked by either side in reference to them. He speaks of an inventory as having been then made, but this, with the other papers relating to the transaction, if there were any, was destroyed in the great fire, and all the proof we have on this point consists of admissions or statements said to have been made by Lill shortly thereafter. Three witnesses then in the interest of Brant & Co. or of Black, testify to conversations had by them severally with him, in which he said that he had taken all of Horan's property to protect himself as his security for a debt of some \$3,500, but that they had no occasion to be uneasy about the claims they represented, since there was means enough in his hands to pay all the creditors so far as he knew; that he would dispose of the property in such time and manner as would be most advantageous to all concerned, and that all would be paid—himself first, and then the others.

Nor is the value of the property satisfactorily shown, the extreme estimates being three thousand and twenty thousand dollars.

Horan remained in charge of the business after the transfer, and under the direction of Lill continued to sell the stock in the usual course along until the summer or perhaps September, following, when the remnant was closed out at public auction, for about the sum of \$400.

In May of that year the claim of Paris & Allen was put into a judgment for \$4,982.40; on the 14th of July Horan exe-

Lill et al. v. Brant.

cuted to Lill a warrantee deed, in the common form, of the two lots before mentioned for the expressed consideration of \$500; and on the 6th of September Lill satisfied the judgment by the payment of \$5,145.00.

Horan died in 1868. Dennehey was one of the executors of his will, and although he thought himself familiar with his affairs, talked with him about them shortly before his death and in view of his own appointment as executor, and had been a witness of the transfer, he never knew or heard of any claim by him against Lill on account of this transaction, and settled the estate without reference to it.

In April, 1875, Lill sold the two lots, which had then been improved by the erection thereon of a fence and a cottage, and otherwise, for \$5,500, less the commissions—one-fourth in cash and the residue in equal yearly installments. In the following fall he also died, and in the spring of 1876 appellee's letters of administration were taken out and this claim filed.

Upon the record, which is above sufficiently shown to present the questions of law involved, our conclusions are, first, that this claim, as stated by the appellee, was not within the jurisdiction of the County Court, nor consequently of the Circuit Court, which on appeal could be no broader; second, if it was, it was not proved as alleged; and third, whether as alleged or as proved, if any claim was proved, it was barred by the Statute of Limitations.

What was the character of the transaction between Horan and Lill, as set forth in the claim filed, and what the relation thereby created between them? Was it a mortgage, a sale, or a proper trust?

Appellee contends that it was a mere mortgagee to secure the indebtedness of Horan to Lill, with the resulting legal liability on the part of Lill to account for the excess of the proceeds of the mortgaged property, if any, to Horan or to such of his creditors as should take the steps necessary to reach it. Certainly there was a provison, so far as it might go, for the payment of that indebtedness, but we do not discover in it the features of a mere mortgage. There is no day given for payment, no defeasance, no equity of redemption in the real estate.

Lill et al. v. Brant.

Nor was the provision limited to the payment of Lills' debt, with the right in Horan to the excess unless it should be intercepted by creditors through legal means, as would have been implied if there had been no express reference to creditors. If the duty was not absolutely imposed, the power was given to pay them, by the terms of the agreement alleged. The language employed, "to pay to other creditors of said Horan *or* to said Horan himself," is not as clear, perhaps, as might have been used, but taken in connection with the statements following—that there were other creditors, and that by reason of the premises Lill became indebted to Horan's estate for the use of his creditors as well as of his heirs—sufficiently manifests the understanding of the parties, that out of the excess Horan should pay these creditors directly. We would hardly expect such repeated use of the expression if no more was meant than the law would clearly imply without any. And the construction we are disposed to give it is further aided by all the considerations of propriety and justice applicable to the circumstances.

So then, by reason of what it contained as well as of what it omitted, it was something else than a mere mortgage or security for the debt of Lill. Nor was it a sale in any proper sense. Lill neither paid nor promised to pay any price in any form or manner, nor did the property by virtue of the conveyance become his. On the contrary he became bound to hold and use until he should dispose of it, and sooner or later to dispose of it, not for the benefit of himself alone, but of others as well.

And this, it seems, is just what distinguishes a trust from a sale. If property be conveyed to one to be held, used and disposed of at his own will, or for his own benefit, it is a sale, notwithstanding his agreement to pay the price to others than the grantor by direction of the latter. In that case he becomes a mere debtor, and his promise a simple assumpsit for the breach of which the grantor, or those for whose benefit it was made may sue at law and recover their respective damages. But if it be conveyed to be held, used and disposed of for the benefit of others, he is a trustee, and the property and its proceeds a trust fund which the *cestuis que trust* alone can pursue, and in a court of equity. *Doyle v. Murphy*, 22 Ill. 502;

Lill et al. v. Brant.

Steele v. Clark, 77 Ill. 471; *Vallette v. Bennett*, 69 Ill. 632.

The conveyance in question, as set forth in the statement of appellees' claim, being, in our opinion, of the latter kind, the claim itself was not within the jurisdiction of the Probate Court, which could not take the necessary account, nor marshal assets, nor discriminate between creditors whose claims are of the same class.

But if it had been it was not proved as stated. Manifestly the cause of action exhibited was the breach of an express contract. That contract, therefore, was material to be stated, and it included the consideration of it. It was expressly although not formally stated to be a conveyance of certain property upon certain declared trusts, on the one side, in consideration of certain indebtedness of the grantor to the grantee, to be thereby provided for, and the promise of the latter to execute those trusts, on the other. Whether the consideration of that indebtedness was material or not, the fact of such indebtedness as the consideration, in whole or in part, of the conveyance, was. Now the proof is, that such was not the consideration, nor any part of it. Horan was not indebted to Lill for goods sold and delivered, or otherwise. His debt was owing to Paris & Allen, and Lill was not even security for it. He was security on a bond of indemnity against it to Dennehey. And so the trust was not to pay any debt due to Lill, but to pay a debt due to Paris & Allen. Variances of this character between the proof and the declaration in an ordinary action at law, would be fatal; and the same rule is applied to a claim filed in the County Court. *Brock v. Slaten*, 82 Ill. 282.

But still further, the proof shows that Lill disposed of all the personal property and fully paid the debt due to Paris & Allen by the 6th day of September, 1865, and this was fully known to Horan at the time. Was it not the legal duty of the trustee immediately thereupon and without demand to pay over any excess in his hands to Horan or to his creditors, according to their respective rights? We fail to see why this cause of action, if any there is, whether legal or equitable, did not then accrue, and is not therefore barred by the statute of limitations. *Hayward v. Gunn*, 82 Ill. 385.

Miller v. Excelsior Stone Co.

We disregard the fact that Lill did not dispose of the two lots until April, 1875, relied on to take the case out of the statute, as immaterial in this connection. The conveyance of the lots was absolute in form, and not being in fact a mortgage or mere security for debt to the grantee, as we have attempted to show, parol evidence could not be received to affect its legal import. And the record shows that it was made long after the transfer of the personal property. The witness Prentiss states that Lill told him he had two lots of Horan's; but if he meant that he so told him in February, 1865, when they first talked of the transfer of the personal property, his memory as to the time is probably at fault. He had repeated interviews with Lill in relation to this matter during the spring and summer, and may easily, after the lapse of so many years, have confused the times when the several statements were made. The record is absolutely reliable as to dates, and it also appears that Lill told another witness that the lots would not nearly make him whole; as if they had been conveyed after he knew what the personalty realized.

We are therefore of opinion that the errors complained of are well assigned, and the judgment of the Circuit Court is accordingly reversed and the cause remanded.

Reversed and remanded.

MARTHA A. MILLER

v.

THE EXCELSIOR STONE COMPANY.

1. BILL OF EXCHANGE—ESSENTIAL REQUISITES.—A bill of exchange must be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and it should be for the payment of money only, and not for the performance of any other act, or in the alternative.

2. WHEN PAYABLE UPON A CONTINGENCY.—The following instrument held not to be a bill of exchange, because made payable upon a contingency: "Please pay to the Excelsior Stone Co. for stone for your buildings, six hundred dollars in installments, as follows: \$200 out of first estimate, or when

Miller v. Excelsior Stone Co.

the first floor joists are in ; \$200 when the building is ready for the roof ; \$200 when the stoops are finished, and charge the same to my account."

3. **HAPPENING OF THE CONTINGENCY.**—Where the payment depends upon a contingency, the happening of such contingency will not change the character of the instrument. It was not a bill of exchange when made, and would not become such by matter *ex post facto*.

4. **PAYABLE OUT OF A PARTICULAR FUND.**—It appearing from the testimony in the case, that the drawer of the above instrument had contracted with the drawee to erect certain buildings, and was to receive his pay therefor in installments as the work progressed; *held*, that the reasonable intentment to be given the above instrument was, that it was to be paid out of a particular fund, viz : out of installments due the drawer under his contract with the drawee, and hence the instrument lacked an essential quality of a bill of exchange.

5. **AGENCY—RATIFICATION.**—While the mere silence of a principal may, under some circumstances, be deemed a ratification of the acts of a pretended agent, yet a mere failure to disavow such acts *instantly* upon being apprised of them, will not *ipso facto* be a ratification.

ERROR to the County Court of Cook county ; the Hon. MASON B. LOOMIS, Judge, presiding.

Messrs. BAKER and OSGOOD, for plaintiff in error; argued that the instrument sued on is not a bill of exchange, and cited Gillilan v. Myers, 31 Ill. 525; Byles on Bills, 1; Walters v. Short, 5 Gilm. 252; Newhall v. Clark, 3 Cush. 376; 1 Parsons on Bills, 304; 1 Daniel Neg. Inst. § 517; Lamon v. French, 25 Wis. 39; Mitchell, Admr. v. Fond du Lac, 61 Ill. 174.

As to agency and declarations of agent : Whiteside v. Margarel, 51 Ill. 507; Ward v. Williams, 26 Ill. 447.

Instructions to jury: Ind. & St. Louis R. R. Co. v. Miller, 62 Ill. 468.

Mr. H. M. MATTHEWS, for defendant in error; contending that the instrument is a bill of exchange, cited Glancy v. Elliot, 14 Ill. 456; White v. Smith, 77 Ill. 351; 1 Parsons on Notes, 301; Byles on Bills, 187; Nowak v. Excelsior Stone Co. 78 Ill. 307.

That error will not reverse when it appears substantial justice has been done: McClurkin v. Ewing, 42 Ill. 283; Tim-

Miller v. Excelsior Stone Co.

mons v. Broyles, 47 Ill. 92; Charter v. Graham, 56 Ill. 19; Calhoun v. O'Neal, 53 Ill. 354.

BAILEY, J. This was an action of assumpsit brought by the Excelsior Stone Co. against Martha A. Miller, in the County Court of Cook county. The plaintiff's action was based in part upon an open account, and in part upon an instrument of which the following is a copy:

“CHICAGO, July 12, 1877.

“Mrs. MARTHA A. MILLER:—Please pay to the Excelsior Stone Co., for stone in your buildings, six hundred dollars, in installments as follows: \$200 out of first estimate, or when the first floor joists are in; \$200 when the building is ready for the roof; \$200 when the stoops are finished, and charge the same to my account.

“JAMES PARROTT.

“Accepted July 12, 1877.

“MARTHA A. MILLER.”

The first and second of the installments stipulated for in this instrument were paid by Mrs. Miller before the commencement of the suit, leaving the third installment unpaid.

The evidence shows that on the 28th of June, 1877, James Parrott agreed in writing with Mrs. Miller, to furnish all the materials and build for her a block of two three-story and basement dwelling houses, according to certain plans and specifications, the same to be completed by the first day of October, 1877, for which he was to be paid the sum of \$7,750, upon estimates to be made by the architect from time to time, as the work progressed. It was further agreed, that in case of his neglect or failure at any time to proceed with the work with suitable despatch, Mrs. Miller should be at liberty to employ other persons to complete it, and deduct the expense of so doing from the amount to be paid to Parrott.

It seems that Parrott, being unable to obtain from the plaintiff the stone to be used in the buildings on his own credit, drew the foregoing instrument, and procured its acceptance by Mrs. Miller, and that the plaintiff, after receiving it, furnished to Parrott thereon stone for Mrs. Miller's buildings, to the

Miller v. Excelsior Stone Co.

amount of \$599.80. Parrott proceeded with the erection of the buildings up to about the first of September, 1877, when he abandoned the work and refused to proceed further therewith, the walls of the second story of the buildings being at the time nearly completed, and those of the third story commenced. Mrs. Miller afterwards hired men by the day to complete the work, except the front steps, which were built by one Donaghue by contract, for \$400.

One of the leading questions presented by the record is, whether the instrument above recited is a bill of exchange, or only a contract operating as an equitable assignment to the plaintiff, *pro tanto*, of the indebtedness thereafter to accrue to Parrott from Mrs. Miller. If the former, Mrs. Miller cannot now be permitted to insist that there was no consideration for her acceptance, or that such consideration has failed. *Nowak v. Excelsior Stone Co.* 78 Ill. 307. If the latter, her liability to the plaintiff must depend upon the state of the accounts between her and Parrott.

The essential qualities of a bill of exchange are said to be that it must be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and that it be for the payment of money only, and not for the performance of any other act or in the alternative. *Gillian v. Myers*, 31 Ill. 525; *Cook v. Satterlee*, 6 Cow. 108; *Munger v. Shannon*, 61 N. Y. 251; 1 *Parsons on Bills and Notes*, 42.

We think the instrument in question lacks one or more of these essential qualities. Each installment was made payable on the happening of a future event, which so far as could then be known might or might not take place. The buildings had not then been erected, and it was uncertain and contingent whether they would ever reach either of the several stages of completion upon which the respective installments were to mature. It is true, there was a contract between the parties for the erection of the buildings, but it was still within their power voluntarily to abandon their enterprise, or they might be compelled to do so for lack of the means to prosecute it. The buildings might have been destroyed before completion, or the parties might have died before completing them, or various

Miller v. Excelsior Stone Co.

other supposable contingencies might have stood in the way of the happening of the events upon which the several installments were made payable.

The rule that negotiable instruments must be made payable absolutely, is founded upon the consideration that a contingency as to the time of payment would greatly impair and diminish their credit, circulation and negotiability, since the person to whom they were offered in negotiation would be obliged to inquire when these uncertain events would probably be reduced to certainty, and whether the conditions would be performed or not. And hence the rule is, that a bill of exchange always implies a personal, general credit, not limited or applicable to particular circumstances and events which cannot be known to the holder in the general course of negotiation; and if it wants upon its face this essential quality or character, the defect is fatal. Story on Bills and Notes, § 46.

Nor in this case does the fact that the building was afterwards erected, cure the defect. The character of the instrument as a bill of exchange must be determined in the light of the facts existing at its date, and if it had not the character of a bill of exchange then, such character cannot be given it by matter happening afterwards.

In *White v. Smith*, 77 Ill. 351, the court, in case of a promissory note, say: "Where the payment depends upon a contingency, it will make no difference that the contingency does in fact happen afterwards on which the payment is to become absolute, for its character as a promissory note cannot depend upon future events, but solely upon its character when created. So, in *Kelly v. Hemmingway*, 13 Ill. 604, a note payable to a person when he should become twenty-one years old, was held not a promissory note. The court say: "The payment was to be made when the payee should attain his majority—an event that might or might not take place. The condition might never happen, and therefore the money was not certainly and at all events payable. The instrument lacked one of the essential ingredients of a promissory note, and consequently was not negotiable under the statute. The fact that the payee lived till he was twenty-one years of age, makes no difference. It

Miller v. Excelsior Stone Co.

was not a promissory note when made, and it would not become such by matter *ex post facto*."

We are further of the opinion, that the instrument in question, especially when interpreted in the light of surrounding facts, was drawn not upon the personal general credit of the drawer, but upon a particular fund, viz: the money which would become payable to him upon performance of his contract to erect the buildings. The first installment is in terms payable "*out of the first estimate, or when the first floor joists are in.*" This language may fairly be understood to import that when the first floor joists were in the drawer would become entitled to his first estimate, and that the first installment should be paid out of such estimate. A portion of the money drawn for being payable out of a particular fund, the character of the instrument as a bill of exchange is as effectually defeated as though the whole were so payable.

It is true, the instrument in fixing the time and manner of payment of the other installments, makes no express reference to subsequent estimates, but we think such reference being made in relation to the first installment may be implied as to the others. By the contract between Parrott and Mrs. Miller, Parrott was to be paid upon estimates made by the architect as the work progressed and not otherwise. These installments being made payable when the buildings should reach certain successive stages of completion, and express reference being made to the first estimate as occurring at the first of these stages, thus entitling the drawer to the first payment on his contract, and out of which he directs the first installment to be paid, the fair intendment we think is that the subsequent installments were to be paid out of estimates to be made at the several subsequent stages of the work. Any other interpretation would, it seems to us, do violence to the intention of the parties.

The court below having held the instrument in question to be a bill of exchange, payable absolutely and generally upon proof of the happening of the events therein mentioned, we think an error was committed, for which the judgment must be reversed.

The verdict and judgment were for \$285.70, being the total

Miller v. Excelsior Stone Co.

amount claimed by the plaintiff below. This amount was made up of the balance unpaid on the order; also an account for \$38.22, claimed by the plaintiff to be due from Mrs. Miller for stone bought by her through her husband, David Miller, as her agent, to be used in the walls of the buildings after Parrott abandoned his contract; also a balance of \$47.50, due on the stone used by Donaghue in erecting the front steps.

As to both of the last two items there was a considerable conflict of testimony. As to the item of \$38.22, the authority of Mrs. Miller's husband to act as her agent in the purchase of the stone was in controversy, it being directly disputed by the testimony of both Mrs. Miller and her husband. Whether the stone purchased by David Miller was in fact purchased on his own behalf or for his wife, was also in dispute. As to the item of \$47.50, the evidence was conflicting upon the question whether the stone for which that item was owing, was in fact sold to Donaghue or to Mrs. Miller, it being also claimed by the plaintiff in respect to that item, that the contract was made in behalf of Mrs. Miller by her husband as her agent. Upon this state of the proof, the court gave the following instruction, at the instance of the plaintiff:

"The jury are instructed as matter of law, that although a party falsely representing himself to be an agent of a principal, may make a contract which in the first place would not be binding on the principal, yet the principal may make it her own contract by ratification, and unless the principal disavow the acts of the pretended agent as soon as they come to her knowledge, she ratifies the contract as her own."

This instruction, we think, states the rule much too fully. While the mere silence of a principal may, under some circumstances, be deemed a ratification of the acts of a pretended agent, who wholly without authority from the principal, has assumed to make contracts on his behalf, yet a mere failure to disavow such acts *instantly* upon being apprised of them, would not *ipso facto* be a ratification. We do not think that the duties which one person owes to another, compel the instant disaffirmance and repudiation of the acts of a mere intruder,

Kappes et al. v. The Geo. E. White Co.

under penalty of being bound by such acts. We think under the evidence in this case, this instruction had a manifest tendency to mislead the jury.

Complaint is made of other errors in the record, which we do not deem it necessary to notice, but for the errors above mentioned we reverse the judgment, and remand the cause for a new trial.

Reversed and remanded.

GEORGE KAPPES ET AL.

V.

THE GEO. E. WHITE HARD WOOD LUMBER CO.

1. PAYMENT BY PROMISSORY NOTE.—Where parties agree to accept a promissory note in payment of a debt, the taking of such note in pursuance of the agreement, merges the original cause of action in the note, and a recovery, if had at all, must be had upon the note. And if such agreement was in fact made, and a note given in pursuance thereof, the creditor cannot rescind such contract for the purpose of suing upon the original cause of action by simply returning the note.

2. INSTRUCTIONS.—Where the evidence tended to show that the plaintiff accepted a note in payment of the original debt, an instruction to the effect that if the jury believe, from the evidence, that the defendants paid the plaintiff the bill in question by their note, and the plaintiff accepted said note as payment, then such payment was a satisfaction of the bill; and the fact that the plaintiff afterward gave said note to defendant's bookkeeper would not revive said account, unless it should appear from the evidence that the bookkeeper had authority to receive the same; and unless it further appear that there was an agreement cancelling the acceptance of said note and reviving said bill, was proper, and should have been given.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Messrs. BRANDT & HOFFMAN, for appellants.

Messrs. MUNN, INGHAM & POPE, for appellee; argued that in rendering a verdict for the plaintiff the jury did substantial

justice, and where this appears a judgment will not be reversed, although some of the instructions are wrong, and cited Leigh v. Hodges, 3 Scam. 15; Dishon v. Schorr, 19 Ill. 59; Hardy v. Keeler, 56 Ill. 152; C. B. & Q. R. R. Co. v. Dickson, 63 Ill. 151; Ill. Cen. R. R. Co. v. Swearingen, 47 Ill. 216; T. W. & W. R'y Co. v. Ingraham, 77 Ill. 309.

That taking of a note is not payment of a pre-existing debt: Heart v. Rhodes, 66 Ill. 351; Story on Prom. Notes, § 104; Puckford v. Maxwell, 6 T. R. 53; Morrison v. Smith, 81 Ill. 221.

Upon the right to return the note and bring suit upon the original cause of action: Stevens v. Bradley, 22 Ill. 244; Hughes v. Wheeler, 8 Cow. 76.

MURPHY, P. J. This was an action of assumpsit, commenced to the January term, A. D. 1878, of the County Court of Cook county, by appellee against appellants, to recover for a bill of lumber theretofore sold to appellants, amounting to \$551.19. At that term of court, the cause came on to be tried by the court and a jury, which resulted in a verdict and judgment against appellants for \$551.19, from which judgment the appellants prayed an appeal to this court, and bring the record here, and assign several errors; the first and second of which raise all the questions in the record which it will be necessary for us to consider. The first is, that the court erred in giving appellees instructions.

Second, in refusing to give and in modifying, and giving as modified, appellants' instructions. It is admitted by appellants that prior to the 4th day of October, 1877, they had purchased lumber at different times of the appellee, and that on that date there was justly due to appellee the sum of five hundred and fifty-one dollars and nineteen cents from the appellants. But it is insisted by the appellants that on that day there was an accounting between appellee and appellants, and that appellants executed and delivered their promissory note, due in sixty days to appellee for the amount of said bill, and that it was then and there agreed by and between them that the appellee should accept said note in full payment of the bill.

There is evidence in the record strongly tending to sustain

Kappes et al. v. The Geo. E. White Co.

their view of the case, but on that question the testimony is conflicting. It is claimed by appellee that the promissory note was received by it, but not in payment of the bill, and that it had the right to recover on the original account, claiming to have returned the note to the appellants before suit brought. It is insisted by appellee that it agreed to accept the note in payment of the bill upon the following condition, namely: that appellee should give to the appellants its note for the same amount, and due at the same time of the note first mentioned, and that appellants should get the same discounted and pass the proceeds over to the appellee, in which event the note given by the appellants was to be received in payment of said bill, but not otherwise. It appears that the appellee gave the appellants such a note, and that they were unable to get the same discounted; that they returned it to the office of the appellee by the hand of their book-keeper, and informed its president of the result of their efforts in that respect; that upon receipt by said president of the note of appellee, given for the purpose of being discounted as above stated, by the hand of the appellant's book-keeper, he returned to said book-keeper at the same time the note of the appellants taken on said lumber bill, as above set forth, and claim the right now to recover on the original cause of action.

As will be seen, the right to do this depended on the question of whether there was a valid contract, as claimed by the appellants, to accept said promissory note in payment of the original cause of action, for if so, such cause of action, by virtue of such contract, and the giving of such note in pursuance thereof, became merged in the note, and the recovery, if had at all, must be had upon said note. If such a contract was in fact made, and the note given in pursuance of it, obviously, the appellee could not rescind such contract by simply returning such note to the book-keeper of the appellants, or otherwise, without the consent of the appellants, no fraud being claimed by either party.

The appellants requested the court at the trial to instruct the jury as follows, to wit: "4th. If the jury believe, from the evidence, that the defendants paid the plaintiff the bill in

Beach et al. v. Jeffery.

question by their note, and that the plaintiff accepted said note as payment of said bill, then such payment was satisfaction of said bill; and the fact if the jury shall believe, from the evidence it is a fact—that the plaintiff gave said note afterwards to the book-keeper of the defendants—would not revive said account, unless it shall appear from the evidence that said book-keeper had authority to receive said note, and also unless it further appears from the evidence that there was an agreement cancelling the acceptance of said note as payment of said bill, and reviving said bill;” which the court refused to do, to which the appellants excepted. This we think was error. We think the instruction embodies the law, and makes a correct application of its principles to the evidence in this case, and should have been given.

As we are of opinion that the case must be reversed and remanded for the errors already pointed out—a further discussion of errors is not deemed necessary for the purposes of this decision, but with a view to avoid the same errors on another trial of the cause, we may observe, that we think there is no well founded objection to instructions No. 1, 2 and 3, as asked by appellants, and that they should have been given by the court as asked: That to modify or change them was error, and for these errors the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

ELIAS BEACH ET AL.

v.

THOMAS B. JEFFERY.

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1. **TENDER—IN ACTIONS OF TORT.**—By the statute relating to tender, defendants in actions of tort as well as defendants in actions *ex contractu*, have the right to make tender to the plaintiff of such sum as they shall conceive sufficient amends for the injury done, and for costs if suit has been commenced, and if it shall appear that the sum tendered is sufficient, the plaintiff will not be allowed to recover any costs incurred after such tender.

Beach et al. v. Jeffery.

2. EFFECT OF A PLEA OF TENDER—ADMISSION OF LIABILITY.—A plea of tender is an admission of liability, and the defendant is estopped by the record from denying that he is indebted to the plaintiff in the sum named in his plea.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Messrs. ELDRIDGE & TOURTELLOTTE, for appellants; that the verdict is contrary to the evidence, cited Reynolds v. Lambert, 69 Ill. 495; Ill. Cen. R. R. Co. v. Chambers, 71 Ill. 519; Toledo, W. & W. R. R. Co. v. Moore, 77 Ill. 217; City of Chicago v. Lavelle, 83 Ill. 482.

That a plea of tender admits a liability: Chitty on Con. 793; Cilley v. Hawkins, 48 Ill. 308; Monroe v. Chaldeck, 78 Ill. 429; Chitty on Con. 803; Sweetland v. Tuthill, 54 Ill. 215.

Mr. J. HENRY TRUMAN, for appellee; that a court will not disturb the verdict of a jury where the evidence is conflicting, unless it is clearly against the weight of evidence, cited Wallace v. Wren, 32 Ill. 146; Underhill v. Fake, 46 Ill. 56; Bunker v. Green, 48 Ill. 243; Demos v. Hannaman, 46 Ill. 185.

MURPHY, P. J. On the 19th day of October, 1876, appellants sued out of the Circuit Court of Cook county, a *capias ad respondendum* against appellee, who being arrested by the sheriff, gave bail as required by law. Appellants filed their declaration in said cause to the November term, 1876, in trespass on the case, consisting of three counts, alleging fraud on the part of appellee, by means of which appellants were cheated and defrauded out of a number of sewing machines, the particular facts constituting such alleged fraud being specified in each of said counts, being substantially the same cause of action. To this declaration appellee filed four (4) pleas: *First*, plea of not guilty; *Second*, plea of payment; *Third*, plea that except as to the sum of sixty dollars, parcel, etc., the plaintiffs suffered no grievance or damage as complained, and of this he puts himself upon the country, and tender as to said sum of sixty dollars; *Fourth*, plea of set-off as to all but sixty dol-

lars, and tender of that sum. Upon these pleas issues were joined; and thereafter, at the December term, 1877, a trial was had by a jury in said cause, which resulted in a verdict of not guilty, and judgment against appellants for costs; from which judgment they prayed an appeal to this Court, and bring the record here, and assign several errors—only two of which will be necessary for us to consider; the second and third, which are: The verdict is contrary to law; third, the Court erred in overruling the motion for a new trial. It is claimed by appellants that the evidence fails to support the verdict, and that a clear preponderance of evidence is against the verdict; and that upon that ground alone it is the duty of this Court to reverse the cause.

Inasmuch as the case must be submitted to another jury for trial, we deem it not only unnecessary but improper to discuss the questions of fact involved in the case, and we therefore forbear such discussion, or the expression of any opinion which would be calculated to influence a jury upon a second trial of the cause. The question which we propose to discuss, and which we consider material, is one of law, raised by the issue formed upon the plea of tender.

By this plea, appellee admits his liability to appellants in the sum of sixty dollars, and being an admission of record in the case, we think, is a conclusive admission, and upon which admission, as matter of law, the appellant's were entitled to a judgment for that amount upon that sole ground, independent of any other evidence tending to establish a liability.

Cilley et al. v. Hawkins, 48 Ill. 312, was a case instituted for the recovery of unliquidated damages for the breach of a contract existing between said parties. Under the 38th section of the Practice Act then existing, provision was only made for a tender of money or goods due on contract, and not for damages growing out of a tort or breach of contract. It was held that the tender pleaded in that case was not well pleaded, for the reason that under the law, as it then stood in an action to recover unliquidated damages, the plea was not good; a tender could not be made, but notwithstanding, it was unavailing as a legal tender, being an action to recover unliquidated damages, it

Beach et al. v. Jeffery.

was held nevertheless an admission by the defendant in error that the damages amounted to the sum tendered. But since the decision of the above entitled case, the legislature has, by the 6th section of an Act to revise the law in relation to tender, approved March 7th, 1874, provided that "whoever is guilty of a trespass or injury, may, at any time before or after suit brought, tender what he shall conceive sufficient amends for the injury done, and if suit has been commenced, also the costs of suit up to the time of making such tender; and if it shall appear that the sum tendered was sufficient amends for the injury done, and if suit had been commenced, was also sufficient to pay such costs, the plaintiff shall not be allowed to recover any costs incurred after such tender, but shall be liable to the defendant for his costs incurred after that time."

By this statute it is made the legal right of defendants in actions of tort as well as defendants in actions ex contractu, to make tender for the benefit of the plaintiff, and thus protect themselves for the payment of costs. It is urged by appellee that the plea of tender in this case is not responsive to the declaration, the same being in trespass on the case, and insists that it is only applicable in actions ex contractu. To this position the statute above quoted is a full and complete answer, as is shown; the right of a defendant to tender is by this statute as complete in the one case as in the other; but if it were not so provided by the statute, upon every principle of law and reason the appellee is estopped to say that the plea is not responsive to the declaration, when he has by his own voluntary act, pleaded the same, and thus spread upon the record his solemn admission of a liability to that amount, and cannot be heard to say that the plea is not responsive to the declaration.

In *Monroe v. Chaldeck*, 78 Ill. 432, the Supreme Court, in discussing the effect of a plea of tender in this regard, use this language: "Under the authority cited, we cannot regard this admission as otherwise than as conclusive upon appellant; he is estopped by the record from denying that he is indebted to appellee in the sum named in his plea. The very object of a tender is, to enable the plaintiff in the action, if he sees proper

Pease et al. v. The Underwriters' Union.

to accept the amount conceded by the defendant to be due, and thus put an end to the litigation. This object could not be attained if the defendant was not bound to abide by his tender."

In *this* case it does not appear that the money tendered was brought into court; hence it was not in the power of the court to order the money paid over to appellants, and hence, under the admissions in the plea, the court could do no less than render judgment for the amount admitted by the plea and for costs. This amount the jury should have found upon the admission of the appellee in this plea, even though they had found against the appellants upon the other evidence in the case. For these reasons we think the motion for a new trial should have been sustained, and that to deny it was error, and for which error the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

SAMUEL W. PEASE ET AL.

V.

THE UNDERWRITERS' UNION, use, etc.

1. CORPORATIONS—LIABILITY OF STOCKHOLDER, ETC., UNDER THE STATUTE, FOR UNPAID STOCK—MANNER OF PROCEEDING AGAINST—STATUTE CONSTRUED.—A creditor of a corporation may bring suit in any of the usual forms of action, for an indebtedness due to him from such corporation, and upon suing out summons may at the same time sue out a garnishee summons against any of the stockholders whose subscription to the capital stock is wholly or in part unpaid, and by the service of such summons upon the stockholder, may prevent further payment to the corporation for such stock, and hold the same in abeyance, to await the result of the trial of the original cause; and when a recovery is had, the garnishee may be compelled to respond to such judgment creditor instead of paying his indebtedness to the corporation.

2. PROCEEDING UNDER THE STATUTE.—If the cause is commenced and conducted according to the statute, the whole proceeding will constitute but one case, and upon the trial of the issues formed upon the answers of the garnishees, the Court will take judicial notice of the judgment against the principal debtor.

Pease et al. v. The Underwriters' Union.

3. PROCEEDING BY THE USUAL PROCESS OF GARNISHMENT—PROOF OF JUDGMENT.—But where the creditor having obtained a judgment against the corporation, seeks to enforce the liability of the stockholder by a subsequent, independent proceeding of garnishment in the usual manner upon such judgment, the proceeding is essentially different, and proof of the judgment originally obtained against the corporation must be made upon the trial of the issues against the garnishee.

3. DENIAL OF LIABILITY—BURDEN OF PROOF.—The garnishees having answered, denying that they were stockholders, and had never been subscribers to the capital stock in said corporation, the burden of proof was upon the party insisting upon their liability as stockholders to show that they were such.

4. CERTIFIED COPY OF ARTICLES OF INCORPORATION AS EVIDENCE.—A certified copy of articles of incorporation, wherein the names of the garnishees appear as subscribers to the capital stock, is incompetent evidence for the purpose of overcoming the answers of the garnishees denying that they ever subscribed to such capital stock, without showing in some way that they were parties to the original articles of incorporation.

5. LIMIT OF LIABILITY—INDIVIDUALLY, NOT JOINTLY.—By the terms of the statute, the liability of the stockholder is limited by the amount of his subscription unpaid at the time of service of the garnishee summons, and such liability is individual, not joint. The statute does not intend a joint liability as partners.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Messrs. ELDRIDGE & TOURTELLOTE, for appellants; argued that the certified copy of articles of incorporation offered in evidence was incompetent, as against strangers, and cited *Chase v. Sycamore & Courtland R. R. Co.* 38 Ill. 215; *Whitaker v. Wheeler*, 44 Ill. 440; *Yocum v. Benson*, 45 Ill. 435.

That the record fails to state sufficient grounds to authorize the commencement of garnishee proceedings: *Mich. Cen. R. R. Co. v. Keohane*, 31 Ill. 145; *Campbell v. McCahan*, 41 Ill. 45.

That the burden of proof is upon the plaintiff to show that defendants were stockholders: *Kergin v. Dawson*, 1 Gilm. 86; *McCoy v. Williams*, 1 Gilm. 584.

As to conditions under which a subscriber to capital stock may become a stockholder, and when not: *Busey v. Hooper*, 35 Md. 15; *Chase v. Sycamore & Courtland R. R. Co.* 38 Ill. 215;

Pease et al. v. The Underwriters' Union.

Starratt v. Rockland F. & M. Ins. Co. 65 Me.; Belfast & M. R. R. Co. v. Cottrell, 66 Me.; Bucher v. Dillsburg, etc. R. R. Co. 76 Pa. St. 306; Steele v. Dunne, 65 Ill. 298; Stowe v. Flagg, 72 Ill. 397; Thrasher v. Pike Co. R. R. Co. 25 Ill. 393.

That defendants' liability, if any, is individual and not joint: Hurd's Stat. 1874, 288; Baker v. Adm'r of Backus, 32 Ill. 82; Crystal Lake Ice Co. v. Backus, 32 Ill. 116.

Mr. J. W. WAUGHOP, for appellee; as to liability of a stockholder on unpaid subscriptions for stock, cited Upton, assignee, v. Tribilcock, 8 Chicago Legal News, 65; Butler v. Walker, 80 Ill. 345.

That the original judgment against the corporation is not a necessary jurisdictional part of this case: Warne v. Kendall, 78 Ill. 598.

That the liability is joint: Hurd's Stat. 1877, 285, § 8.

MURPHY, P. J. This is a garnishee proceeding commenced in the County Court of Cook county, by George W. Miller, against the appellants as stockholders of the Underwriters' Union, a corporation organized under the laws of this State. Such proceedings were had in the court below at the January term, A. D. 1878, as resulted in a judgment against Samuel W. Pease and Charles F. Loomis, as garnishees of said corporation, jointly, for the sum of \$550.00, from which they prosecute an appeal to this Court, and assign for error:

First, that the court erred in admitting improper evidence offered on the part of the appellee, and in overruling the appellants' objection thereto.

Second, that the judgment is contrary to law.

Third, the judgment is not supported by the evidence.

Fourth, the judgment, if any, should have been against the appellants separately. There are other errors assigned, but it is not deemed necessary for us to consider them.

This was a proceeding under the 8th section of chapter 32, of the Revised Statutes of 1877, at page 284, being an act

Pease et al. v. The Underwriters' Union.

concerning corporations, approved April 18, 1872, which reads as follows:

“Every assignment or transfer of stocks on which there remains any portion unpaid, shall be recorded in the office of the recorder of deeds of the county within which the principal office is located, and each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. No assignor of stocks shall be released from any such indebtedness by reason of any assignment of his stock, but shall remain liable therefor jointly with the assignee until the said stock be fully paid. Whenever any action is brought to recover against the corporation, it shall be competent to proceed against any one or more stockholders at the same time to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment. Every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon to the extent and in the same manner as if he had been the original subscriber.”

It will be seen that by the terms of this statute a new remedy is provided for the creditors of corporations, by providing that “Whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more stockholders at the same time * * as in case of garnishment.” There has been some discussion between counsel in the case, as to the proper form of procedure by the *usee* Miller, to avail himself of the benefit of this new remedy.

There has been no judicial construction of this statute that we are aware of, and we are left to determine just what the mode of proceeding contemplated by the legislature was.

We think the language employed in the statute is unambiguous, and fairly interpreted means that a creditor of a corporation may bring suit in any of the usual forms of action for any indebtedness due to him from such corporation, and upon suing out summons, may by virtue of this statute sue out at the same time a garnishee summons, directed to any of the stock-

Pease et al. v. The Underwriters' Union.

holders of such corporation, whose subscription to the capital stock thereof is wholly or in part unpaid, and that by the service of such garnishee summons upon such stockholder, prevent his further payment for such stock to the corporation, but hold the same in abeyance, to await the result of the trial of the original cause, and when a recovery is had (if at all) the garnishee may be then compelled to respond to such judgment creditor instead of paying his said indebtedness to the corporation.

This is briefly and substantially the proceeding which we think the statute authorizes at the instance of a creditor of a corporation.

It appears from a transcript of the record of the original cause, filed as an additional record in this case, but which was not used in the trial below and not included in the bill of exceptions, and as a consequence we cannot make it the basis of any action of ours in determining the case, that the creditor, George W. Miller, in attempting to avail himself of said statute, commenced suit in the Court below against the Underwriters' Union and the appellants jointly, and that afterwards and during the progress of the cause in that Court, he dismissed said suit as to the appellants, and prosecuted his claim to judgment against said corporation, then resorted to the usual process of garnishment under the statute, upon such judgment, having first filed his affidavit, and from thence appears to have abandoned his purpose of proceeding under the statute above quoted, and conducted the case in conformity to the requirements of chapter 62 of the Revised Statutes of 1877. This becomes material in determining the necessity of the introduction on the trial below of the record of said judgment.

For if commenced and conducted according to the statute above quoted, then the whole proceeding constitutes one case, and upon the trial of the issue formed upon the answers of the appellants, the court would take judicial notice of the judgment, and it need not necessarily be offered in evidence.

But where, as in this case, the proceeding against the garnishees is an independent proceeding on the judgment rather than upon the indebtedness, as we have shown the statute con-

Pease et al. v. The Underwriters' Union.

templated, the proceeding is essentially different, and to maintain which the judgment so obtained by said Miller would necessarily have to be introduced in evidence and preserved in the bill of exceptions, when such bill purports, as in this case, to contain all the evidence offered on the trial.

We think the court erred in rendering judgment against appellants as garnishees, proceeded against as above shown, without proof of the judgment originally obtained in the case between Miller and the corporation.

The issues being formed by the order of the court under the statute as to the truth of the answers of the appellants as garnishees in the court below, the appellants having answered that they were not stockholders in said corporation, and never had been subscribers to its capital stock, the *onus probandi* was upon the appellee: 1st Gilman, 86; McCoy v. Williams, Id. 584. Upon the trial of that issue the appellee offered in evidence a certified copy of the articles of incorporation of the Underwriters' Union, for the purpose of showing appellants to be stockholders therein, which was admitted by the court over the objection of appellants. We are at a loss to see on what legal grounds this was allowed by the court. It is not pretended that the names of the appellants, which appear there as subscribers for stock, are in the hand-writing of the appellants; nor is there any evidence tending to show that they ever signed the original, of which this purports to be a copy, or were in any way connected with its execution as original evidence of a cause of action against appellants, and so furnishing a basis of recovery against them. We think this certificate of incorporation was incompetent, and its admission against the objection of appellants, error. These appellants both answer to the interrogations filed, that they never at any time subscribed for stock in this corporation, and it will not be competent for the purpose of overcoming such answers to introduce copies of articles of incorporations in which their names appear, without showing in some way that they were parties to the original.

By the terms of this statute giving this remedy, it is provided that the liability of stockholders shall be limited by the

Johnson v. Breaton.

amount of their subscriptions unpaid at the time of service of the garnishee summons. From the language employed it is obvious that the liability is individual and not joint. They are not intended to be made liable jointly as partners, but individually, according to their unpaid subscription to the capital stock of the corporation. If it were otherwise, the greatest injustice would inevitably ensue.

To illustrate: Suppose two stockholders of a corporation are sued by garnishment for \$1,000.00; one of such stockholders, owing for and owning \$1,000.00 of the stock and one \$100.00 of the stock, the latter being personally responsible and the former wholly irresponsible. If they are jointly liable a judgment would go against them jointly as garnishees for the \$1,000.00. By the judgment therefore against the corporation, the stockholder who only owns \$100.00 of the stock, and consequently only owes the corporation \$100.00, would thus be compelled to pay \$1,000.00, whilst in fact he only owes the corporation \$100.00. This construction of the statute will not do. It cannot be supposed for a moment that the legislature intended anything of the kind, and yet if the view contended for by the appellee be adopted, such a result is unavoidable.

It was therefore error for the court below to render judgment, even though the case were fully made out by the proof against the defendants jointly; and for these errors the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

SWEN J. JOHNSON

v.

JOHN BREATON.

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1. PLEA OF PAYMENT—BURDEN OF PROOF.—Where payment is set up as a defense to an action for the recovery of money, the burden of proof is on the party alleging payment, to establish that fact by a fair preponderance of testimony.

Johnson v. Breaton.

2. REJECTION OF EVIDENCE—GROUND FOR REVERSAL.—The defendant testified to the fact of payment, stating time and place when the same was made. This the plaintiff denied, and introduced a witness by whom he offered to show that the defendant did not settle or pay the account as he had testified, which the court refused to allow. *Held*, that it was competent, and the right of the plaintiff to contradict defendant as to the time and place where he claimed to have made payment; that while the error may have been slight, and it is not for every error that a judgment will be reversed, still where, from the record, the court is unable to say that substantial justice has been done, a new trial will be granted.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. ELLIOTT ANTHONY, for appellant; as to the burden of proof being upon the party alleging payment, cited 2 Greenl. Ev. § 516; *Hinman v. Pope*, 1 Gilm. 131; *Wall v. Kertz*, 15 Ill. 200; *Howard v. Bennett*, 72 Ill. 297; *Ross v. Utter*, 15 Ill. 402; *Union Nat. Bank v. Baldenwick*, 45 Ill. 375.

Mr. JOSEPH SCHLERNITZAUER, for appellee.

MURPHY, P. J. This was an action of assumpsit commenced in the Superior Court of Cook county, at the February term, A. D. 1876, by the appellant against the appellee, to recover as was alleged a balance due him of \$450.00 for work and labor done as carpenter and joiner, and material furnished for appellee in the repairing and reconstructing of a house belonging to him in the city of Chicago. A jury was waived by the agreement of the parties and the cause was submitted to the court for trial, and upon the hearing judgment was rendered against the appellant for costs, from which he prayed an appeal to this court. He brings the record here and asks a reversal of the judgment, on the grounds that the court below erred in excluding proper evidence offered by him. There are other errors assigned, but it will be unnecessary for us to consider them.

It appears that in the year 1870, the appellant being a carpenter, was employed by the appellee to alter over and rebuild a house for him. It appears also that during the progress of the work the appellee requested appellant to buy the necessary

Johnson v. Breaton.

materials for the purpose of carrying on such work, which he did, and made purchases of such materials, and paid for the same at different times, amounting in all to \$450.00, which with the bill for the labor performed on the building, which was \$432.50, aggregated \$882.50.

This sum does not appear to be disputed by the appellee. The controversy arises on the question of appellee's alleged payment of the same. Johnson, the appellant, testifies that on or about the 23d day of November, 1870, there was an accounting between the parties, a full settlement, and that there was thereby found to be due to the appellant \$450.00 for materials furnished, and that the same has never been paid, and that there is now that amount, with interest from that time, due to him, which was all the testimony offered in the first instance by the appellants.

The appellee then testified that on or about the said 23d day of November, 1870, he paid to appellant the amount due for labor, as above stated in cash, and that previous thereto he had paid him for the material furnished, thus paying and satisfying the bill in full. Appellee testifies that at the time he paid the money to appellant there was no one present except themselves. Thus it will be seen that there is an irreconcilable conflict between the testimony of the only two witnesses, who certainly know as to the truth or falsity of such alleged payment. In such a case, resort must be had to surrounding circumstances, to aid in determining who it is, if possible, who is testifying to the truth, and who not.

For the purpose of corroborating his testimony in this regard, the appellee introduces as a witness one Alex Herman, who testified to a conversation which he heard between the parties to the suit, which occurred sometime between Christmas and New Year of that year, which might shed some light on this question, but for the fact that he finally states that he did not know what was the subject of their conversation. In addition to which, appellant being subsequently called in rebuttal, denies distinctly ever having had any such conversation. This was all the testimony offered by the appellee. The appellant, for the purpose of rebutting the testimony of the appellee, in-

Johnson v. Breaton.

troduced as a witness one Gustav Nelson, by whom he offered to prove that appellee did not settle or pay for the work on or about the 23d day of November, 1870, as he had testified he had done.

We are unable to perceive any legal objection to that testimony as the case then stood. The controversy being, as it was, on the plea of payment, the burden of proof was on the appellee to make out the fact of payment by a fair preponderance of testimony.

Johnson having testified that the balance of \$450.00 found due him on a settlement was then due and unpaid; Breaton having testified that he had paid the same, fixing the time and place when and where he did so.

Under this state of the case it was competent and the right of the appellant to contradict appellee as to the time and place when and where he claimed to have made such payment, as a circumstance calculated to corroborate his theory and testimony, namely, that it had never been paid at all.

Whilst the error may be admitted to be a slight one, and whilst it will be admitted that it is not for every error that a judgment should be reversed, still, where it can be seen that the error may have affected the party complaining injuriously, and where from the record this court is unable to say that substantial justice has been done, it is the right of the party to have a new trial, in which he will not be compelled to encounter the error. We cannot say how far the testimony offered and rejected would have gone to affect the result of the trial in the court below, nor can we feel a reasonable certainty from this record as to whether the bill has been paid or not.

At any rate, we think it was the right of the appellant to make the proof offered, and that it was error for the court to reject it; and for which error the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

Mitchell v. McNab.

ROBERT B. MITCHELL

v.

DUNCAN MCNAB.

1. PAROL CONTRACT—PAYMENT TO BE MADE IN LAND—STATUTE OF FRAUDS.—A party who, under a parol contract, has rendered services in payment for land, cannot repudiate or annul the contract on the ground that it is within the Statute of Frauds, and recover the value of his services, there being no default on the part of the other contracting party.

2. REFUSAL OF VENDOR TO PERFORM—IMPLIED CONTRACT.—Where one through his own act or neglect cannot, or availing himself of the right arbitrarily given by the statute, will not, perform an express agreement for which he has received a consideration, the law, from the circumstances, will imply one that will bind him, at least to return the consideration received; but so long as the vendor is in no default, but is able and willing to convey according to the terms of the parol contract, the purchaser who has executed it on his part by payment in money, property or labor, cannot annul or avoid it, and recover the amount paid or the value of the labor performed.

3. VOIDABLE CONTRACT—PERFORMANCE BY PURCHASER.—A parol contract for the purchase of lands, although it cannot be enforced against the vendor, by reason of the prohibition of the statute, is yet not void. It remains a lawful contract, resting upon a lawful consideration. The party who has performed has thereby put it out of his power to repudiate on his part, and he has no right or authority to repudiate it for the other, who might, for himself, if he would, but who chooses rather to perform; and the purchaser is without remedy until he puts the other party in default.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Messrs. IVES & STEVENS, for appellant; that the contract was valid, and could not be avoided by appellee until he had put the other party in default, and that the plea of the statute of frauds is a personal privilege, cited McCoy v. Williams, 1 Gilm. 584; Abbott v. Draper, 4 Denio 51; Westfall v. Parsons, 16 Barb. 645; Coughlin v. Knowles, 7 Met. 57; Wetherbee v. Potter, 99 Mass. 361; Dogget v. Brown, 28 Ill. 493; Johnson v. Moore, 1 Blackf. 253; Lane v. Shakford, 5 N. H. 130; Duncan v. Baird, 8 Dana 101; Shaw v. Shaw, 6 Vt. 75; Chitty on Con. 306.

That the contract was not void for uncertainty: Bac. Abr.

Mitchell v. McNab.

“Grant H.” 3; Haven v. Crain, 6 N. H. 93; Canning v. Pinkham, 1 N. H. 353; Estes v. Furlough, 59 Ill. 298; Dike v. Greene, 4 R. I. 285; Thompson v. Stevens, 71 Pa. St. 161.

Mr. F. SACKETT and Mr. GEO. E. STOWE, for appellee; contending that the contract was within the Statute of Frauds and could not be enforced, and that appellee could recover on a *quantum meruit*, cited 3 Par. on Con. 35; Hain v. Goodrich, 37 N. H. 185; Cuddy v. Brown, 78 Ill. 415; Temple v. Johnson, 71 Ill. 13; King v. Brown, 2 Hill, 485.

That part performance will not take a case out of the statute: Wheeler v. Frankenthal, 78 Ill. 124; Cuddy v. Brown, 78 Ill. 415.

That the contract was voidable at the will of either party: Collins v. Thayer, 74 Ill. 138.

That the contract was void for uncertainty: 1 Chit. on Con. 92; 1 Story's Eq. § 767; 3 Par. on Con. 354; Shelton v. Church, 10 Miss. 774; Hammer v. McEldowney, 46 Pa. St. 334; Farwell v. Lother, 18 Ill. 252.

That the Statute of Frauds is presumed to have been pleaded in an action before a justice of the peace: Comstock v. Ward, 22 Ill. 248; Williams v. Corbett, 28 Ill. 262.

It is not error to refuse an instruction based upon a state of facts upon which there is no evidence: East v. Crow, 70 Ill. 91; Nichols v. Bradsby, 78 Ill. 44; I. B. & W. R. R. Co. v. Birney, 71 Ill. 391.

Where substantial justice appears to have been done, the judgment will not be disturbed: Dishon v. Schorr, 19 Ill. 59; Schwarz v. Schwarz, 26 Ill. 81; Rice v. Brown, 77 Ill. 549; Cottingham v. Owens, 71 Ill. 397; Sterling Bridge Co. v. Baker, 75 Ill. 139.

PLEASANTS, J. Under a verbal agreement between the parties, appellee did two hundred rods of grading upon the streets of appellant's subdivision of a tract of land at Arlington Heights. A dispute arose about the mode of payment provided by it,—appellant claiming that it was to be in average lots of the subdivision at \$100 each, and appellee denying it and insisting on the

cash. The latter brought his suit before a Justice of the Peace, which was appealed to the Circuit Court. On the trial the defendant introduced evidence tending to prove the contract as he claimed it to be, and there was no pretense that he had refused or been unable to convey in pursuance of it or had said or done anything to avoid it. But the court instructed the jury that if the agreement was only verbal it was not binding upon either party, and if plaintiff went on and did the work with the knowledge of defendant, and since that time they have been unable to agree upon the terms of settlement, then plaintiff had the right to recover in this action what such work was reasonably worth,—and refused to instruct them that if plaintiff had agreed to take his pay in lots as above stated, and had never selected any nor asked defendant to convey in payment, then he could not recover in this action, although they should believe from the evidence that the work was properly done.

There was a verdict for plaintiff, which the court refused to set aside, and a judgment thereon—from which defendant appealed to this court, and here assigns several errors, all of which are embraced in the giving and refusing the instructions as above set forth.

The question thus presented is, whether a party who under a parol contract has rendered services in payment for land, can repudiate or annul the contract, and recover the value of his services, without default shown on the part of the other.

Appellee holds the affirmative, and insists that under the Statute of Frauds such an agreement is void, or at least voidable at the pleasure of either party and at any time before its complete performance by both, without regard to the ability and willingness of the other to perform on his part: citing *Ham v. Goodrich, Adm'r, &c.*, 37 N. H. 185; *King v. Brown*, 2 Hill, 485; and *Collins v. Thayer*, 74 Ill. 138.

But in each of these cases the party who had agreed to convey was in default before and at the time of suit brought. In the first he had died without having conveyed, whereby performance and demand of performance had alike become impossible; in the second, he had voluntarily disabled himself by

Mitchell v. McNab.

conveying to another; and in the last he had given express notice that he no longer considered himself bound.

Where one, through his own act or neglect cannot, or availing himself of the right arbitrarily given by the statute, will not, perform an express agreement for which he has received a consideration, the law, from these circumstances, may justly imply one that will bind him at least to return that consideration. On this principle the plaintiffs in the cases cited were allowed to recover—not under the special counts upon the express contract, but under the common counts for money, work and labor, upon a contract implied by the law.

And they really decide no more, although in two of them the courts used language perhaps broad enough to support the proposition here contended for. Thus, what was said by Mr. Justice NELSON, in 2 Hill, and relied on by counsel here, that “the true principle is this: the contract being void and incapable of enforcement in a court of law, the party paying the money or rendering services in pursuance thereof may treat it as a nullity and recover the money or the value of the services rendered, under the common counts,” was true of the case before him. The contract there was void, not because it was in parol, but because it had been *in fact avoided*—the defendant who had agreed to convey to the plaintiff had annulled it by conveying to another person; but in reference to cases like the one at bar it would be quite inaccurate.

So in Collins v. Thayer the point under consideration was not before the court. There also the contract was in fact terminated—both parties so asserted, and it was unnecessary to say whether it was or] was not terminable at any time and at the mere will of either party upon notice to the other; and therefore what was said on that subject is not to be regarded as authoritative.

These are the strongest cases for the appellee of which we have any knowledge, but in our view they fail to support his position.

On the other hand the decisions are numerous to the effect that so long as the vendor is in no default, but is able and willing to convey according to the terms of the parol contract, the

Mitchell v. McNab.

purchaser who has executed it on his part by payment in money, property or labor, cannot annul or avoid it, and recover the amount paid or the value of the labor performed: Dowdle v. Camp, 12 Johns. 451; Westfall v. Parsons, 16 Barb. 649; Abbott v. Draper, 4 Denio, 51; Coughlin v. Knowles, 7 Metc. 57; Wetherbee v. Potter, 99 Mass. 360; Lane v. Shackford, 5 N. H. 130; Shaw v. Shaw, 6 Vt. 75; Johnson v. Moore, 1 Blackf. 253; Duncan v. Baird, 8 Dana, 101.

We refrain from quotation, remarking merely that these decisions seem to be in point, and to rest upon solid ground of legal and moral principle.

The reason is, that in such cases the contract, although it cannot be enforced at law against the vendor by reason of the prohibition of the statute, is yet not void. It remains a lawful contract, resting upon a lawful consideration. The party who has performed has thereby put it out of his power to repudiate on his part—the very idea of repudiation after actual performance being incongruous—and he has no right or authority to repudiate it for the other, who might for himself, if he would, but chooses rather to perform. He must recover, then, if at all, upon an implied agreement; but the law never implies an agreement in the presence of an express one, which is lawful, subsisting, covering the same subject matter, and which the party sought to be charged is ready and willing to fulfill. He is therefore without remedy until he puts the other party in default, as he ought to be, since he has suffered no wrong. He has done no more than he lawfully and knowingly agreed to do, and may receive, if he will, all that he agreed to take. This reasoning seems to us to be unanswerable.

The conclusion reached is not in conflict with the doctrine that payment of the price alone will not take a parol contract for the sale of land out of the statute. That doctrine is established for the protection of the vendor who has not performed, and means no more than that such payment will not prevent *him* from successfully pleading the statute in bar of any action brought upon the contract, either to enforce its performance or to recover damages for its non-performance.

Nor is it opposed by the rule which requires mutuality of

City of Chicago v. Gavin.

obligation by contracts. Here there was complete mutuality, both of obligation by the contract and of right or privilege under the statute to avoid it. If it has been destroyed or impaired, it was by the voluntary act of the party complaining of it, and with presumed knowledge of its legal effect. His complaint, therefore, is not to be heard.

The further point was suggested by counsel on the argument here, that if the contract was as claimed by appellant it was void for uncertainty, inasmuch as it did not ascertain the particular lots to be conveyed. We think, however, that it sufficiently provided the means of ascertaining them. The intention of the parties certainly was that they were to be ascertained, either by the selection of one or the other of them or by their mutual agreement, and which, is to be arrived at by construction. When so arrived at, it will be in legal effect the same as if it had been so clearly expressed.

We are of opinion that the Circuit Court erred in giving and refusing the instructions, as stated. The judgment must be reversed and the cause remanded for further proceedings not inconsistent herewith.

Reversed and remanded.

THE CITY OF CHICAGO

v.

WILLIAM W. GAVIN.

1. CONTRIBUTORY NEGLIGENCE—EVIDENCE.—The jury having by their verdict exonerated the plaintiff from the charge of contributory negligence, the court is not inclined, from what evidence appears in the record, to question the correctness of that finding.

2. PREVENTION OF ACCIDENTS—DUTY OF CORPORATION.—The officers of a corporation are not required or expected to do every possible thing that human energy or ingenuity can do to prevent the happening of accidents or injuries to its citizens. When they have exercised reasonable care, diligence, judgment and foresight in that regard, they have discharged their duty to the public.

3. DRAWBRIDGES—CONSTRUCTION OF BARRIERS.—In the management

City of Chicago v. Gavin.

of these dangerous passage-ways, the city is not bound to so construct and manage them as to render accidents impossible, but only to exercise such a degree of care, prudence and judgment as prudent and careful men may be reasonably expected to exercise in view of the dangers involved. The character of safeguards around such bridges must necessarily be left, in the first instance, to the judgment and discretion of the proper city officers, and it is only when they have failed to exercise reasonable care and prudence in that respect that the city can be held liable.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. R. S. TUTHILL, for appellant.

Mr. PLINY B. SMITH, for appellee; that there was no contributory negligence on the part of the plaintiff, cited *City of Chicago v. Major*, 18 Ill. 349.

As to negligence on the part of the city: *Shearman & Redfield on Negligence*, § 250.

BAILEY, J. In this case William W. Gavin, an infant, by Ellen T. Gavin, his next friend, brought suit against the City of Chicago to recover damages for a personal injury alleged to have been caused by the negligence of the city. The plaintiff at the time of the injury was a child between three and four years of age, living with his parents on Butterfield street, Chicago, about midway between 18th and 19th streets, and in the vicinity of a quarter of a mile from the draw-bridge over the South Branch of the Chicago River, on 18th street. At about 10 or 11 o'clock in the forenoon of the 18th of June, 1874, the plaintiff and his brother, a boy about five years old, were with some other children on 18th street, at or near the bridge. The bridge, after being opened for the passage of a propeller, was closing, and had swung around sufficiently to bring a part of the roadway of the bridge opposite the roadway of the street, when the children, who were there, the plaintiff among them, ran upon the bridge, and whilst standing there or in the act of stepping off, the bridge being still in motion, the plaintiff fell, and caught his arm between the end of the bridge and the abutment, whereby his arm was so crushed as to render amputation necessary.

City of Chicago v. Gavin.

On the trial by a jury, under a plea of not guilty, the plaintiff recovered a verdict for \$3,500, upon which verdict the court below, after denying the defendant's motion for a new trial, rendered judgment for the plaintiff. It is not charged that the employes of the city were guilty of any negligence in operating and closing the bridge in the manner in which it was done. The only negligence charged against the city, upon which the plaintiff bases his right to recover, was its failure to place and maintain a suitable barrier across the approach to the bridge, or to have such approach otherwise suitably guarded while the bridge was open. On the part of the city, it is insisted that the evidence discloses contributory negligence properly chargeable to the plaintiff sufficient to preclude a recovery. The jury by their verdict have exonerated the plaintiff from the charge of negligence, and have found the city guilty, as charged in the declaration. The question presented for our consideration is, whether this finding is sustained by the evidence. First: was there negligence on the part of the plaintiff? It is not disputed that at the time of the injury the plaintiff was of such tender years as to be personally incapable of discretion, and so no negligence is imputable to him, growing out of his own conduct. It is claimed however that he was negligently suffered by his parents to be upon the streets unattended by any person of sufficient discretion to guard him against the dangers to which he would thereby be exposed, and that such negligence of his parents must be deemed in law his negligence.

The evidence shows that his parents were at the time in humble circumstances, living in the second story of a small tenement house, and dependent for their support upon the daily labor of the plaintiff's father, who at the time of the injury was in a distant part of the city at work, and so were unable to employ a servant or nurse to attend to their children.

About two hours before the injury the plaintiff's mother was taken violently ill, and after suffering for a time, dispatched her oldest child, a daughter, then about eight years old, for a physician. According to the testimony of both mother and daughter, the physician came at about ten o'clock, and was in the house, according to the daughter's statement, about two

minutes, and according to the mother's, about eight or ten minutes. They both testify that as the physician came in they saw the plaintiff and another child, still younger, at play in an adjoining room; that as soon as the physician left they discovered the plaintiff's absence; that thereupon, the mother directed the daughter to make instant search for him; that the daughter at once went out, looked around the house, and returned with a report that she could not find him.

She then went out again, in obedience to her mother's directions, and proceeded at once to 18th street, only half a block distant, and on reaching that street, discovered a crowd of men about a block from the river coming towards her, bearing her brother with his arm broken. According to her estimate it was only about five minutes from the time she and her mother discovered his absence to the time she found him on 18th street. She however estimates the interval between the arrival of the physician and her discovery of the men bringing her brother from the bridge, at fifteen minutes or half an hour. If we are to rely upon the accuracy of the estimates of these witnesses as to the lapse of time, it is not easy to reconcile the fact of his being at the bridge, a quarter of a mile from home, with their statement that he was in the house so short a time before.

Plaintiff's mother admits that the brother who was with him at the bridge was not in the house so far as she knew. Although he was but five years old, she was ignorant of his whereabouts. She says she thought he was better able to take care of himself than his younger brothers, and so far as appears he was allowed to be upon the streets without restraint. That the plaintiff should have escaped from the house, joined his brother and made his way to the bridge within the very brief interval allowed by the testimony of these witnesses, is scarcely reconcilable with ordinary experience. We cannot say, however, that it was physically impossible, even if these witnesses are strictly accurate as to the lapse of time. Their estimate however may be, and probably is, far from being exact, and the jury having found plaintiff's mother guilty of no negligence in permitting his escape from the house, we are not disposed to disturb their finding in that respect.

City of Chicago v. Gavin.

The law will not hold parents, situated as were the plaintiff's, to as strict a rule in relation to allowing their children to be upon the streets of a city, or in providing them with suitable attendants to guard them from accident, as it would parents in more affluent circumstances. Moreover, the sudden illness of the plaintiff's mother may very properly have been regarded by the jury as affording, under the circumstances, a sufficient answer to any charge of negligence on her part.

Did the evidence then warrant the jury in finding the city guilty of negligence? There can be no doubt that a municipal corporation having by law the care, supervision and control of its public streets and bridges, is held to the exercise of reasonable care, diligence, judgment and foresight in so constructing and maintaining the same as to prevent injuries to persons traveling or rightfully being thereon.

Such corporation however is not liable for every accident that may occur within its limits. Its officers are not required or expected to do every possible thing that human energy or ingenuity can do to prevent the happening of accidents or injuries to the citizen.

When they have exercised reasonable care, diligence, judgment and foresight in that regard, they have discharged their duty to the public. *City of Centralia v. Krouse*, 64 Ill. 19; *City of Aurora v. Pulfer*, 56 Id. 270. Both the South Branch of the Chicago River and 18th street are public highways, and the use of both by the public necessitates the erection and maintenance of a draw-bridge of substantially the character of the one in question. Such a structure cannot be maintained and operated without subjecting the public to some degree of danger.

This danger is one of the necessary incidents to the crossing of a highway over a navigable stream by means of a draw-bridge. While it is doubtless the duty of the city in constructing and operating these dangerous passage ways to exercise a high degree of care and foresight in providing against accidents, it is not bound to so construct and operate them as to render accidents impossible.

All the law requires is the exercise of such degree of care,

City of Chicago v. Gavin.

prudence and judgment as prudent and careful men may be reasonably expected to exercise in view of the dangers involved. The construction, mode of operating and character of safeguards surrounding such bridges must necessarily be left in the first instance, at least, to the judgment and discretion of the proper city officers, and it is only when they have failed to exercise reasonable care and prudence, that the city can be held liable. In determining whether such care has been exercised, regard should be had not merely to the exceptional circumstances of a particular accident, but to all the various circumstances incidental to the use of such structures by the public.

The evidence shows that the bridge in question, and also the various other bridges over the Chicago River and its branches, have for many years, and probably from the time of their original construction, been operated and used without barriers or other guards across their approaches while open for the passage of vessels.

So far as appears this condition of things has elicited no complaint from the public, but seems to have been acquiesced in as being, all things considered, the best, most convenient and safest.

The evidence shows that the officers of the city have not been wanting in attention to the many devices for barricades which have from time to time been presented. Mr. James K. Thompson, who has had entire supervision and charge of the bridges of the city nearly one half of the time for the last twenty years, testifies that perhaps one hundred of these devices were brought to his attention while in charge of these bridges, and that he had made experiments with several of them, but in case of every device tried the barricade was found to be the occasion of more accidents than it prevented, and was consequently abandoned. It seems to be the deliberate judgment of the officers charged with the management of these bridges, after full investigation and experiment, that, considering all the exigencies of travel over them, they are really safer and expose the public to fewer accidents without than with any barrier yet devised.

We think the evidence fails to show that they are mistaken in this conclusion. Doubtless after a particular accident has

City of Chicago v. Gavin.

happened, it can be easily demonstrated that a given device would have prevented it. But if it appears that such device might have been the means of occasioning other accidents equally severe, a failure to adopt it is not negligence.

It is however insisted that negligence is a question of fact for the jury, and the jury having determined that the absence of a barricade was negligence, their finding should not be disturbed. Doubtless negligence, ordinarily, is a mere question of fact, in respect to which the verdict of a jury, when supported by proper evidence, should be regarded as conclusive; but we cannot admit the application of this principle to the extent contended for.

The absurdities to which such application would lead are apparent. One jury passing upon the circumstances of a particular accident, may hold the city liable by reason of its failure to maintain a barricade of a given description. Acting upon such adjudication, the city may then erect the designated structure, and such structure may become the means of injury to some other person; and a second jury may award damages for doing the very thing the first jury required to be done. The question for the jury was, simply, whether the officers of the city were shown by the evidence to have failed to exercise reasonable care and prudence. We think their finding was unsupported by the evidence.

It should be remarked that the negligence of the city should be considered only in its relation to the particular dangers to which the plaintiff was exposed. Had the accident happened in the night time, or had the plaintiff been injured by falling from the abutment into the river, different considerations possibly might be presented. The accident happened in the day time, and when the bridge was so far closed as to bring the roadway of the bridge in part opposite the roadway of the street. The jury were to determine merely whether reasonable care and prudence would anticipate an injury happening at such a time and by such means, and provide against its occurrence by maintaining a barricade. The necessity of maintaining a barricade to prevent children or others from falling from the abutment, was not involved in the inquiry.

It is true, the plaintiff cannot be charged with negligence growing out of his own acts; still the law does not impose upon the city the duty of keeping its thronged streets and bridges in such condition as to be a safe play ground for children incapable of caring for their own safety. The performance of such duty, if required, would be wholly beyond its power. Such thoroughfares are fraught with dangers to little children who may be straying upon them without attendants, which no vigilance on the part of the city can provide against.

If they suffer injury while wandering upon such thoroughfares, even though no negligence may be imputable, unless such injury is caused by a want of reasonable care and prudence on the part of its officers. Otherwise the disaster, however lamentable it may be, must be borne by the party upon whom it falls.

In this case we fail to discover any want of reasonable care and prudence on the part of the city. The judgment therefore must be reversed and the cause remanded.

Reversed and remanded.

THE HUMBOLDT INSURANCE COMPANY

V.

WILLIAM S. JOHNSON ET AL.

1. **INSURANCE POLICY—CONDITION LIMITING TIME TO BRING SUIT FOR LOSS—CONSTRUCTION.**—A clause in a policy for insurance, providing that suit to recover for a loss arising thereunder, should be commenced "within twelve months next after the loss shall occur," obviously has reference to the happening of the casualty insured against, and not to the time when such loss, by the terms of the policy, becomes due and payable. The validity of such stipulations in policies of insurance is no longer an open question.

2. **PRACTICE—PLEADING CONDITION IN POLICY—DEFENSE UNDER THE GENERAL ISSUE.**—The same rules of pleading should prevail in respect to the limitation provided for in the policy, as in case of other limitations of actions, and such limitation should be set up under a special plea, thus allowing the plaintiff an opportunity to reply the facts relied on as excusing what would otherwise have been *laches* in bringing the suit; but it seems that where the declaration on a policy containing such conditions, sets forth proper averments of facts excusing the delay in bringing the suit, such limitation may be shown under the general plea of non-assumpsit.

Humboldt Ins. Co. v. Johnson et al.

3. PROOF UNDER THE GENERAL ISSUE AFTER DEMURRER TO PLEA.—To the declaration in this case, appellant plead specially, setting up the limitation in the policy as a defense, to which plea a demurrer was sustained. On the trial appellant sought to avail itself of this limitation under the plea of non-assumpsit, and asked the court to give certain instructions presenting that defense, which were refused. The instructions correctly stated the law, and had there been any issue before the jury presenting this defense, they should have been given, but after the demurrer was sustained to the plea of appellant, no plea remained under which the limitation could be set up.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. FRANK J. SMITH, for appellant; upon the question of use of a memoranda, made by the witness, to refresh his recollection, cited Green'l on Ev. § 437; Elston et. al. v. Kennicott et. al. 46 Ill. 187; Mattocks v. Lyman, et. al. 16 Vt. 118; Halsey v. Sinsebaugh, 15 N. Y. 855; Russell v. Hudson, etc. R. R. Co. 17 N. Y. 134; Watson v. Walker, 23 N. H. 495; Tuttle v. Robinson, 33 N. H. 113; Brady v. Thompson, 17 Ill. 270; Hartford L. Ins. Co. v. Gray et. al. 80 Ill. 28.

As to proof of non-payment of premiums: Ill. Cen. Ins. Co. v. Wolf, 37 Ill. 354; Provident Life Ins. Co. v. Fennell, 49 Ill. 180; Teutonia Life Ins. Co. v. Anderson, 77 Ill. 384; Teutonia Life Ins. Co. v. Mueller, 77 Ill. 22.

Non-payment of the premium being admitted it must be shown that payment was waived by some one duly authorized therefor: Hambleton v. Home Ins. Co. 6 Biss. 91; Marland v. Royal Ins. Co., Pa. St. continued Life Ins. Co. v. Willet, 24 Mich. 268.

That a limitation clause in a policy is legitimate and must be upheld: Peoria M. & F. Ins. Co. v. Whitehill, 25 Ill. 466.

That the words in the limitation clause have reference to the time when the loss occurs: Riddlesbarger v. Hartford Ins. Co. 7 Wall. 386; Merchants Ins. Co. v. La Croix, 35 Tex. 249; Ripley v. Aetna Ins. Co. 30 N. Y. 136; Roach v. N. Y. & E. Co. 30 N. Y. 546; Provincial Ins. Co. v. Aetna Ins. Co. 16 U. C. (Q. B.) 145; Carraway v. Merchants Ins. Co. 26 La. An. 298.

Mr. M. W. ROBINSON, for appellees; that the limitation cannot apply until a right of action has accrued: Peoria Ins. Co.

Humboldt Ins. Co. v. Johnson et al.

v. Hall, 12 Mich. 202; Mayor et al. v. Hamilton F. Ins. Co. 39 N. Y. 45; Killips v. Putnam F. Ins. Co. 28 Wis. 472; Black v. Winneshiek F. Ins. Co. 31 Wis. 74; Chandler v. St. Paul F. & M. Ins. Co. 21 Minn. 85; Lampkin v. Western A. Co. 13 U. C. (Q. B.) 361; Wood on Fire Insurance, 762.

That non-payment of premium is no defense: Goit v. Nat. Prot. Ins. Co. 25 Barb. 189; Bowman v. Agricultural Co. 2 N. Y. (S. C.) 261; Boehm v. Williamsburg Ins. Co. 35 N. Y. 131; Hodgson v. Marine Ins. Co. 5 Cranch. 100; Bodein v. Excelsior Ins. Co. 51 N. Y. 117.

That an insurance company is estopped to deny that premium has been paid: Ill. Cen. Ins. Co. v. Wolf, 37 Ill. 354; Providence Ins. Co. v. Fennell, 49 Ill. 180; Teutonia Ins. Co. v. Anderson, 77 Ill. 384; N. Y. Cen. Ins. Co. v. Nat. Prot. Ins. Co. 20 Barb. 468; Basch v. Humboldt Ins. Co. 35 N. J. 429; Madison Ins. Co. v. Fellows et al. 1 Disney, 217; Con. F. Ins. Co. v. Cashow, 41 Md. 59; Wood on Fire Insurance, 67.

That there can be no cancellation of a policy without notice to the insured: Landis v. Home Mut. F. & M. Ins. Co. 56 Mo. 591; Van Valkenburg v. Lenox Fire Ins. Co. 51 N. Y. 465; Lyman v. State Ins. Co. 14 Allen, 329.

BAILEY, J. This suit was brought by the appellees on a policy of insurance issued to them by appellant, whereby appellant insured appellees in the sum of \$2,500, against loss or damage by fire, upon their church edifice, for the period of one year from the 20th day of March, 1874. A trial was had before the court and a jury, resulting in a verdict against appellant for \$2,930.37, being the full amount of the policy and interest, whereupon judgment was rendered against appellant for that sum and costs.

The declaration sets out the policy *in extenso*, and among the provisions therein contained is the following:

“It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this company for the recovery of any claim by virtue of this policy, shall be sustained in any court of law or chancery * * * unless such suit shall be commenced within twelve months next after the loss shall

Humboldt Ins. Co. v. Johnson et al.

occur; and should any suit or action be commenced after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

It appears both by the averments of the declaration, and the evidence given at the trial, that the building insured was totally destroyed by fire on the 14th day of July, 1874, and this suit, as the record shows, was commenced by the issuing of summons, on the 13th day of September, 1875.

Among the pleas filed by appellant was one setting up the foregoing condition of the policy, and averring that the suit was not commenced within twelve months next after the loss occurred. To this plea a demurrer was sustained, and the decision of the court sustaining said demurrer is assigned for error.

The validity of stipulations in policies of insurance limiting the time within which suits may be brought for the recovery of losses to a period shorter than that prescribed by the Statute of Limitations, has been so frequently affirmed by the courts of this and other States, as to be no longer an open question. This proposition seems to be admitted by counsel for appellees. An attempt is made, however, to give to the language of the policy in this case a construction which will obviate the effect of the limitation clause above recited as a defense to this suit.

The only question is, when did the period of limitation here prescribed commence to run? We see nothing in the language employed which leaves this in the least a doubtful proposition. According to the plain and unambiguous terms of the policy, the period of limitation commenced to run from the date of the loss. The language is: "within twelve months next after *the loss shall occur*." It would be difficult to employ words less liable to the charge of ambiguity, or less open to construction. The words "the loss shall occur" can only refer to the happening of the casualty insured against. To hold that they refer to the time when the loss becomes due and payable, as appellees' counsel insist, would not be an enforcement of the contract as made by the parties, but a plain substitution of terms to which they have not assented.

Nor do we find anything in the other portions of the policy necessitating the construction contended for by appellees. We are referred in this connection to the provision fixing the time when a loss should become payable. It is as follows:

“The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proof of the same made by the assured and received at this office, in accordance with the terms and provisions of this policy.”

The provisions here referred to determining the time and manner of giving notice and furnishing preliminary proofs of loss, required that persons sustaining loss or damage should forthwith give notice thereof to the company, and as soon thereafter as possible, furnish such preliminary proofs.

We see nothing in these conditions at all repugnant to the language of the limitation clause, or requiring us to place upon it any interpretation different from its plain and obvious import. It should be observed that the duty of giving the notice and furnishing the proofs was imposed upon the assured alone, and was one with the performance of which the company had nothing whatever to do. The time within which the proofs of loss were to be furnished, and as a consequence the time at which the loss should become payable, was entirely within the power of the assured, and the company could not interfere so as to delay or postpone either. By the terms of the policy then, appellees were required to furnish proofs as soon as possible after the loss, and at the expiration of sixty days after their production the loss was to become payable. For the residue of the twelve months after the loss should thus mature, appellees were at liberty to bring suit for its collection. This gave them ten months less the time occupied by them in preparing and serving the proofs to bring suit. This would seem to be ample. This period could be abridged only by their own delay in the production of proofs. In point of fact the proofs in this case were served only seven days after the loss, and appellees had ten months less seven days within which to bring suit. We see no injustice arising from construing the limitation clause in this case according to the plain

Humboldt Ins. Co. v. Johnson et al.

and obvious meaning of the language employed, and we fail to perceive any principle upon which any different interpretation can be upheld.

We are referred to a number of authorities where under the peculiar language of the policy, or the exceptional circumstances of the case, the limitation provided for in the policy has been held to run from the time the loss became payable, rather than from the date of its occurrence. These cases are all clearly distinguishable from the one at bar, and afford us no criterion for the interpretation of the policy before us. The sustaining of the demurrer to appellant's plea setting up the limitation provided in the policy, was error for which the judgment must be reversed.

At the trial appellant sought to avail itself of this limitation under the plea of non-assumpsit, and asked the Court to give two instructions to the jury presenting that defense, which were refused. We think these instructions correctly stated the law, and had there been any issue before the jury presenting this defense, they should have been given. But after the demurrer was sustained to appellant's plea, no plea remained under which this limitation could be set up.

It is true the Supreme Court in *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466, seemed to hold that where the suit was not brought within the time limited in the policy, there should be a proper averment in the declaration of the facts relied on to excuse the delay. Under such a rule manifestly the limitation could be set up under the general issue. In the recent case of *Andes Ins. Co. v. Fish*, 71 Ill. 620, however, a different rule has been established. It is there held that the same rules of pleading should prevail in respect to the limitation provided for in the policy as in case of other limitations of actions, and that when insisted upon, it should be set up by the defense, thus allowing the plaintiff an opportunity to reply the facts relied on as excusing what would otherwise have been *laches* in bringing suit. Before another trial appellant should be accorded the opportunity of presenting this defense by an appropriate plea.

The remaining questions raised by appellant we do not deem it necessary to decide.

Reversed and remanded.

Rees et al. v. Peltzer et al.

JAMES H. REES ET AL.

V.

OTTO PELTZER ET AL.

1. **INJUNCTION BOND—SUIT ON—ASSESSMENT OF DAMAGES ON DISSOLUTION—ACT OF 1861.**—The mode of assessing damages on dissolution of an injunction, provided by the Act of 1861, is not exclusive, so that in case of a failure to have damages so assessed, none can be recovered in any other mode. The statute provides a new remedy, and vests courts of chancery with powers they did not previously possess, but there is nothing in its language which in terms takes away the common law remedy on the bond.

2. **CONSTRUCTION OF ACT OF 1861.**—Where the bond is conditioned for the payment of such damages as may be awarded against the complainant on dissolution of the injunction, such condition has, since the act of 1861, been held to relate solely to damages awarded in the manner provided by the act, so that in the absence of such award, the condition has not been broken, and no recovery can be had thereunder; but this rule does not apply to conditions in the bond so framed as to require the payment of damages or the performance of any other act, irrespective of whether damages are awarded on dissolution of the injunction or not.

3. **CONDITION TO PAY DAMAGES FOR WRONGFUL SUING OUT OF INJUNCTION.**—The bond in suit was conditioned for the payment of all costs and damages that should be awarded in case the injunction was dissolved, and also for the payment of all costs and damages that should accrue by reason of the wrongful suing out of the injunction. These two conditions are independent of each other, and the obligees are at liberty to disregard the former condition and assign breaches of the latter only; and suit for a breach of the latter condition may be maintained, although there has been no assessment of damages as provided by the Act of 1861.

4. **DAMAGES TO PART OF OBLIGEEES NOT RECOVERABLE.**—Where the bond is conditioned for the payment to all the obligees, naming them, "all costs and damages that shall accrue by reason of the wrongful suing out of the injunction," it is an undertaking to pay to the obligees jointly, and no recovery can be had for damages sustained by a part only of the obligees.

5. **DAMAGES PENDING APPEAL, AFTER DISSOLUTION OF INJUNCTION NOT RECOVERABLE.**—The dismissal of the bill operated as a dissolution of the injunction, and although the injunction was continued in force by perfecting an appeal to the Supreme Court, no damages sustained by reason thereof can be recovered under the condition in the bond providing for the payment of damages which should accrue by reason of the wrongful suing out of the injunction. Resort must be had to the bond for appeal for the recovery of such damages.

6. **ATTORNEY'S FEES—PROOF.**—In the assessment of damages, the jury allowed \$2,500 for counsel fees. The testimony upon this point introduced at

Rees et al. v. Peltzer et al.

the trial was that of several members of the bar, who testified in substance that the services rendered by appellee's counsel in the injunction suit were reasonably worth \$2,500; there was no proof that appellees had paid or become liable to pay their counsel said sum or any other sum, or that they had agreed to pay what their services were reasonably worth. This was insufficient. It should have been shown how much appellees had paid or become liable to pay their counsel, and that it was the usual and customary fee paid for such services.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. JUDD & WHITEHOUSE for appellants; contended that the damages should have been assessed under the act of 1861, and that they could not be recovered in this action; and cited 1 Gross' Stat. 459; Laws 1861, 133; Roberts v. Fahs, 36 Ill. 268; Russell et al. v. Rogers et al. 56 Ill. 176; Brownfield et al. v. Brownfield, 58 Ill. 152; McWilliams et al. v. Morgan, 70 Ill. 551; Mix v. Vail, et al. Ill. Sup. Ct. Sept. T. 1877; Mix et al. v. Singleton, Ill. Sup. Ct. Sept. T. 1877; Rev. Stat. 1874, 580; Winkler v. Winkler, 40 Ill. 179.

That if the bond, being a statutory bond, contained conditions not authorized by the statute, such conditions should be rejected as surplusage: United States v. — 1 Brock. 195; Dixon v. United States, 1 Brock. 177; Walker v. Chapman, 22 Ala. 116; Shunk v. Miller, 5 Pa. St. 250; Erlinger v. The People, 36 Ill. 458; Tomlin v. Green 39 Ill. 225.

That damages to only part of the obligees are not recoverable: Safford v. Miller, et al. 59 Ill. 205; Ovington v. Smith et al. 78 Ill. 250; Waters v. Simpson, 2 Gilm. 570; Sharp v. Bedell, 5 Gilm. 88; Miller v. Stewart, 9 Wheat. 680; St. L. A. & R. I. R. R. Co. v. Coultas, 33 Ill. 188; Farni v. Tesson, 1 Black. 309.

Damages accruing after dissolution of injunction are not recoverable: Elder et al. v. Sabin et al. 66 Ill. 126; Jevne et al. v. Osgood et al. 57 Ill. 340; Bullock v. Ferguson, 30 Ala. 227; Ferguson et al. v. Babers, Adm'r, 24 Ala. 402; Mix et al. v. Singleton et al. Ill. Sup. Ct. Sept. T. 1877.

As to allowance of counsel fees in estimating the damages, and insufficiency of proof thereof: Jevne et al. v. Osgood et al. 57 Ill. 340; Collins et al. v. Sinclair et al. 51 Ill. 328.

Mr. M. W. ROBINSON, and Mr. A. W. GREEN, for appellees; upon the question of counsel fees, cited Ryan et al. v. Anderson et al. 25 Ill. 372; High on Injunctions, § 973; School Directors v. Trustees of Schools, 66 Ill. 247; Mason et al. v. Shawneetown, 77 Ill. 533; Cummings et al. v. Burleson et al. 78 Ill. 281; City of Champaign v. Patterson, 50 Ill. 61.

That the act of 1861, in relation to assessment of damages on dissolution of an injunction, is not exclusive of all other modes of assessing such damages: Phelps v. Foster, 18 Ill. 309; Hibbard v. McKindley, 28 Ill. 240; Silsbee v. Lucas, 53 Ill. 479; Colcord v. Sylvester, 66 Ill. 540; Garcie v. Sheldon, 3 Barb. 232.

That damages accruing to a part only of the obligees may be recovered: Cabell v. Vaughan, 1 Saund. 291; Rollo v. Yate, Yelv. 177; Farni v. Tesson, 1 Black. 309; Pearce v. Hitchcock, 2 Com. 388; Sims & Hollis v. Harris, 8 B. Mon. 55; Hibbard v. McKindley, 28 Ill. 240; Vesey v. Mantell, 9 Mees. & W. 323; Pugh v. Stringfield, 93 Eng. C. L. 364; Mehaffy v. Lytle, 1 Watts. 314; Bird v. Washburn, 10 Pick. 223; Boyd et al. v. Martin et al. 10 Ala. 700; Sweigert v. Berk, 8 Serg. & Rawle, 306; Watts v. Sanders, 10 B. Mon. 372; Pearce v. Attrey, 14 W. Va. 22.

As to damages after dissolution of the injunction: Bentley v. Joslin, Hemp. 218; Gray v. Veirs, 33 Md. 159; Wallis v. Dilley, 7 Md. 237; Ryan v. Anderson, 25 Ill. 372.

Substantial justice has been done, and the verdict ought not to be disturbed: Newkirk v. Cone, 18 Ill. 449; Dishon et al. v. Schorr, 19 Ill. 59; McConnell v. Kibbe, 33 Ill. 174; Boyington v. Holmes, 38 Ill. 59; Pahlman v. King, 49 Ill. 266.

BAILEY, J. This was an action of debt on an injunction bond, brought by Otto Peltzer, Gustavus R. Hoffman, Edward A. Fox, and six others, against James H. Rees, Elisha E. Hundley, Luther H. Pierce, Mahlon D. Ogden and Edward H. Sheldon.

The declaration describes a bond in the penal sum of \$10,000, executed by the defendants to the plaintiffs, bearing date September 30th, 1872, and which, after reciting that said Rees,

Rees et al. v. Peltzer et al.

Hundley and Pierce had filed their bill of complaint in the Circuit Court of Cook county, against said Peltzer, Hoffman, Fox, and said six other obligees, for an injunction to restrain them from further proceeding to publish "Peltzer's Atlas of Chicago," and that said court had allowed an injunction for that purpose upon said Rees, Hundley and Pierce, giving bond and security as provided by law, was conditioned for the payment by said Rees, Hundley and Pierce to said obligees of all costs and damages that should accrue by reason of the wrongful suing out of said injunction, and also all costs and damages which should be awarded against said complainants in case said injunction should be dissolved.

The circumstances out of which the controversy grew are briefly as follows: Sometime prior to the great fire of October, 1871, the firm of Rees, Pierce & Co., consisting of said Rees, Hundley and Pierce, real estate dealers, had caused to be made for their own use in their business, a complete set of maps and plats of the city of Chicago, including its several additions and subdivisions. Said maps and plats, about two hundred and eighty in number, were drawn upon a uniform scale of one hundred feet to the inch, so that each covered about eighty acres of land, and was a complete representation of the several lots, blocks, streets and alleys therein contained, with the measurements and locations thereof. These maps and plats were originally compiled by taking copies of those on record in the public offices of the county, and were afterwards improved and perfected from data derived from other authentic sources. In the course of their preparation, which had occupied many years, a large amount of money, skill, judgment and labor had been expended, whereby they had been brought to a high degree of perfection, and were the source of great profit to the proprietors. It also appears that a similar set of maps and plats of the city of Chicago, with its various additions and subdivisions, had in like manner been procured by the firm of Ogden & Sheldon, who were also dealers in real estate, for use in their business.

After the destruction of the public records of the county by the great fire of October, 1871, these two sets of maps and plats, as it appears, were the only complete maps of Chicago in ex-

Rees et al. v. Peltzer et al.

istence compiled from the public records or other authentic sources. An agreement was thereupon entered into between Rees, Pierce & Co. and Ogden & Sheldon, to use the two sets jointly, and divide equally between the two firms the profits arising therefrom. Subsequently, on application of Otto Peltzer, who was then clerk of the board of public works of Chicago, permission was given by said firms to take a copy of said maps and plats for the use of said board, upon the distinct understanding and agreement that the copy thus obtained should not be copied or published or used in any manner except for the official purposes of the board. It was afterwards ascertained that said Peltzer, notwithstanding said agreement, had taken copies of the maps and plats thus in possession of the board, and that he, in company with said Hoffman and Fox, was engaged in lithographing and publishing the same for sale as "Peltzer's Atlas of Chicago."

To restrain the publication of said atlas, said Rees, Pierce & Co., on the 30th day of September, 1872, filed in the Circuit Court of Cook county their bill in chancery against said Peltzer, Hoffman and Fox, and six other persons, composing a firm of lithographers, who were engaged in lithographing said maps, praying for an injunction restraining such publication. On this bill the Circuit Judge endorsed an order allowing the injunction, on complainants filing a bond in the sum of \$10,000, with Ogden and Sheldon as sureties, conditioned according to law. In pursuance of this order, the bond described in the declaration in this suit was executed, and an injunction issued.

On the 11th day of December, 1872, the injunction suit was heard in the Circuit Court, and upon such hearing the bill was dismissed for want of equity. The complainants, the instant this decision was rendered, took an appeal therefrom to the Supreme Court, and filed their appeal bond in the penal sum of \$20,000, conditioned for the due prosecution of said appeal and the payment of costs, interest and damages rendered or to be rendered against the complainants, in case said decree should be affirmed in the Supreme Court. It appears that no suggestion of damages was filed in the Circuit Court at the time of the entry of the decree dismissing the bill, and

Rees et al. v. Peltzer et al.

no damages were awarded against the complainant in that court in the chancery suit. On the 16th day of June, 1875, the Supreme Court rendered its decision affirming the decree of the Circuit Court.

On the trial of the present suit, appellees were permitted to prove the additional expense and labor to which Peltzer, Hoffman and Fox were necessarily put in publishing their atlas by reason of said injunction, both before the entry of the decree of the Circuit Court and during the pendency of said appeal, and also the reasonable value of counsel fees for services in litigating the injunction suit, both in the Circuit and Supreme Courts. The jury found the issues for appellees, and assessed the damages sustained by Peltzer, Hoffman and Fox by reason of the breaches of said bond at \$6,886, specifying in their verdict the items of which said damages were composed, as follows: For legal services, \$2,500; for the expenses of getting out the new maps, \$2,663; for interest on same from June 9th, 1873, to December 8th, 1877, \$723; for extra services by Peltzer, \$1,000. On this verdict judgment was rendered in favor of appellees against appellants for \$10,000 debt, and \$6,886 damages, the debt to be discharged on payment of the damages.

Appellants have urged a number of grounds for the reversal of this judgment, which, so far as we deem necessary to a proper decision of the case, we will now consider in their order.

It is insisted that, as there were no damages awarded by the Court of Chancery upon the dissolution of the injunction, as provided by the act of 1861, none can now be recovered in this suit. The act referred to is as follows :

“In all cases where an injunction is dissolved by any Court of Chancery in this State, the court after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction, suggesting in writing the nature and amount thereof, shall hear evidence and assess damages as the nature of the case may require, and to equity appertain to the party damnified by such injunction, and may award execution to collect the same.” Laws 1861, p. 133.

This act no doubt governs the rights of the parties under the bond in question so far as applicable, unaffected by the

Rees et al. v. Peltzer et al.

amendment of 1874, said bond having been executed prior to said amendment. Such was the holding of the Supreme Court in the recent case of *Mix v. Vail et al.* (unreported).

The point made, is that the mode of obtaining an assessment of damages on dissolution of an injunction provided by the act of 1861 is exclusive, so that in case of failure to have damages so assessed none can be recovered in any other mode. After careful consideration we are unable to yield our assent to this view.

The statute, it is true, provides a new remedy, and vests courts of chancery with powers they did not previously possess, but there is nothing in its language which in terms takes away the common law remedy on the injunction bond, nor do we perceive that such result follows by any necessary implication. Where the bond is conditioned for the payment of such damages as may be awarded against the complainant on dissolution of the injunction, such condition has, since the act of 1861, very properly been held to relate solely to damages awarded in the mode provided by that act, so that in the absence of such award the condition is not broken, and no recovery can be had thereunder. We cannot see how the same rule can be said to apply to conditions so framed as to require the payment of damages or the performance of any other act irrespective of whether damages are awarded on dissolution of the injunction or not.

We are referred to a number of decisions by the Supreme Court under the law of 1861, but none of them seem to sustain the doctrine contended for by appellant's counsel. They all hold that where the condition is, that the obligors will pay all damages that may be awarded against the complainants in case the injunction is dissolved, no breach of the condition can take place unless there is a previous award of damages, and consequently that in the absence of such award no suit can be maintained on the bond. These decisions do not proceed upon the principle that the remedy provided by the act of 1861 is exclusive, but that this particular condition must be held to embrace only damages assessed as provided by the act. In one of the cases referred to, the court in terms admit that if the

Rees et al. v. Peltzer et al.

condition had been different the rule would no doubt be otherwise: Russell et al. v. Rogers et al. 56 Ill. 176. We are referred to no case of a suit upon an injunction bond conditioned as in this case for the payment of all damages that should accrue by reason of the wrongful suing out of the injunction, where it was held that no recovery could be had in the absence of a previous award of damages.

It is true the bond in the present case is conditioned for the payment of all costs and damages that should be awarded against the complainants in case the injunction should be dissolved, but it also contains the further condition for the payment of all costs and damages that should accrue by reason of the wrongful suing out of the injunction. These two conditions are independent of each other, and appellees were at liberty to entirely disregard the former, and assign breaches of the latter only.

The next proposition submitted on behalf of appellant, is that under the bond sued on no damages are recoverable beyond those suffered by all the obligees jointly.

The only damages alleged in the declaration or proved at the trial, were those sustained by Peltzer, Hoffman and Fox, and in which these co-obligors did not participate, and the jury in their verdict expressly limited their assessment to the damages sustained by Peltzer, Hoffman and Fox alone.

The liability of the obligors for damages sustained by three of the obligees alone must depend upon the terms of the bond itself. It is not disputed that a bond might be so framed as to impose upon the obligors a liability to pay damages of this character. The only question is, does this bond impose such liability? The undertaking of the sureties is *strictissimi juris*, and cannot be extended beyond the precise terms of the obligation. The language of the bond is as follows:

“Now therefore the condition of the above obligation is such that if the above bounden James H. Rees, Elisha E. Hundley and Luther H. Pierce, their executors or administrators, or any of them, shall and do well and truly pay or cause to be paid to the said Otto Peltzer, G. R. Hoffman, Edward A. Fox, Bernard Essroger, Edward Ruehlow, Francis Doniat, Bernard H. W.

Zastro-Kussow, Henry Betz and Ferdinand Knapwurst, their executors, administrators or assigns, all costs and damages that shall accrue by reason of the wrongful suing out of the injunction," etc.

This seems clearly to be an undertaking to pay damages *to all the obligees jointly*, and is not an undertaking to pay to a portion of the obligees such damages as they might sustain.

In *Ovington v. Smith et al.* 78 Ill. 250, the condition of the injunction bond sued on was that the obligors should pay or cause to be paid to George W. Smith and Daniel D. Schroeder, their heirs, etc., all such costs and damages as should be awarded against the complainant in case the injunction should be dissolved. It appeared that the injunction had been dissolved as to Schroeder, but not as to Smith, and that upon the dissolution of the injunction the court awarded damages to Schroeder. It was held that the undertaking of the obligors was to pay Smith and Schroeder such damages as should be awarded against complainant upon dissolving the injunction, and that there was no undertaking to pay Schroeder such damages as he should sustain upon dissolution of the injunction, as to him alone. See, also, *Safford v. Miller*, 59 Ill. 205; *St. L. A. & R. L. R. R. Co. v. Coultas*, 33 Id. 190.

In this case the undertaking being expressly to pay certain damages to all the obligees jointly, it will be intended that the damages contemplated were those in which the obligees were jointly interested, and not those with which a portion of them had nothing whatever to do. Had the bond provided for the payment to the obligors, or any or either of them, such damages as they might respectively sustain, the rule would doubtless have been otherwise. But we are of the opinion that under the bond as it reads, no damages can be recovered except such as were sustained by all the obligees. No such damages being averred in the declaration, proved on the trial or found by the jury, the judgment must necessarily be reversed.

It is next urged that under the bond in suit, no damages are recoverable except those which accrued prior to the dissolution of the injunction by the Circuit Court.

The decree dismissing the bill operated undoubtedly as a dis-

Rees et al. v. Peltzer et al.

solution of the injunction, but the immediate filing of an appeal bond continued it in force until the affirmance of the decree by the Supreme Court. Appellees were permitted to prove and recover their damages, not only up to the time of the dissolution of the injunction by the Circuit Court, but during the pendency of the appeal; and also to recover for counsel fees for services of counsel in the Supreme Court. This was error.

The condition of the bond providing for payment of the damages which should accrue by reason of the wrongful suing out of the injunction cannot be held to cover any damages which accrued by reason of wrongfully continuing the injunction in force by means of the appeal bond. The injunction bond can only be held to cover damages up to the dissolution, at the time the decree was entered dismissing the bill. As to subsequent damages, the parties must resort to their appeal bond.

The recent case of *Mix v. Singleton et al.* (unreported), was a suit upon an appeal bond given upon an appeal from a decree dissolving an injunction, and one of the conditions of that bond was that the obligors should pay all damages caused by *wrongfully suing out* the injunction. In the opinion the Supreme Court say: "No condition of the bond obligates defendants to pay such damages as plaintiffs might sustain by reason of the injunction being kept in force by their appeal. Any construction that would make defendants responsible for such damages as might thereafter be sustained, would be to enlarge the undertaking of the sureties on the bond beyond anything expressed in the bond itself. The measure of the liability of sureties is fixed by the terms of the instrument they may sign, and we do not understand such undertaking can be enlarged or varied by judicial construction. That would impose upon a mere surety obligations he had never assumed, and perhaps would have been unwilling to take upon himself. Had this bond been conditioned that defendants should pay such damages as plaintiffs might sustain by wrongfully keeping the injunction in force by the appeal, then the breaches assigned would be more appropriate."

The foregoing case is, we think, decisive of this question, and compels the conclusion that the judgment is erroneous,

Harms v. Fitzgerald.

in that it includes damages accruing during the pendency of the appeal.

Complaint is also made of the insufficiency of the proof on which the jury in assessing damages allowed \$2,500 for counsel fees. On the trial a number of witnesses were produced by appellees, who were members of the Chicago bar, and who testified in substance that the services rendered by appellees' counsel in the injunction suit in both the Circuit and Supreme Courts, were reasonably and fairly worth \$2,500. There was no proof that appellees had paid, or become liable to pay their counsel for said services, said sum or any other sum, or that there was any agreement to pay them what their services were reasonably worth. This proof was, we think, clearly insufficient. In order to entitle themselves to an allowance of counsel fees in the assessment of damages, appellees should have proved what they had paid or become liable to pay, and that it was the usual and customary fee paid for such services. *Jevne et al. v. Osgood et al.* 57 Ill. 347.

In accordance with the views above expressed, the judgment must be reversed and the cause remanded.

Reversed and remanded.

HENRY HARMS, Impl'd, etc.

v.

WILLIAM FITZGERALD.

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51	317

BOARD OF COUNTY COMMISSIONERS—POWER TO SETTLE AND ADJUST CLAIMS AGAINST THE COUNTY—JURISDICTION IN EQUITY.—The law has confided to the Board of County Commissioners the duty, among others, of constructing a court house, and for that purpose has conferred upon it the power to make contracts for such construction, and of necessity the power to exercise the discretion of settling and adjusting claims against the county arising therefrom, and when in the exercise of such discretion it has settled and compromised a claim about which there was dispute, a court of equity, in the absence of any proof of fraud or corruption on the part of the Board, has no jurisdiction to order an injunction restraining the consummation of its agreement to compromise.

Harms v. Fitzgerald.

APPEAL from the Circuit Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

MESSRS. FORRESTER & BEEM, for appellant; contended that a court of equity has no jurisdiction to interfere by injunction with the action of a Board of County Commissioners in settling a disputed claim against the county where there is no proof of fraud or collusion between the Board and the claimant, and cited Att'y. Gen. v. Aspinwall, 2 Mylne & C. 618; Parr v. Att'y. Gen. 8 Clark & F. 409; Att'y. Gen. v. Role, 4 Mylne & C. 17; Att'y. Gen. v. Luhford, 13 Sim. 547; Att'y. Gen. v. Norwich, 16 Sim. 225; Movers v. Smedley, 6 Johns. Ch. 27; Livingston v. Holbrook, 4 Barb. 14; Meserole v. Mayor and Council, 8 Paige, 198; Gillespie v. Broas, 23 Barb. 370; Andrews v. Board Sup'rs Knox County, 70 Ill. 65.

Where injunctions have been granted to restrain municipal corporations, the objects of their appropriations were beyond their legal authority: Colton v. Hanchett, 13 Ill. 615; Town of Ottawa v. Walker et al. 21 Ill. 610; Mount Carbon Coal, etc. Co. et al. v. Blanchard et al. 54 Ill. 240; Sherlock et al. v. Winetka, 59 Ill. 389; Chestnutwood v. Hood, 68 Ill. 132; Livingston County v. Weider, 64 Ill. 427.

As to power of county board: Dillon on Mun. Cor. § 398; Town of Petersburg v. Mappin, 14 Ill. 193; Constitution Art. X. § 7; Rev. Stat. 306, 307.

Upon the question of changes made from the original plans, and that the changes were so important and extensive as to amount to a rescission of the contract: Chit. on Con. 566; Pepper v. Burland, Peake, 103; Robson v. Hall, N. P. R. 230; Wheeden v. Fisk, 50 N. H. 125; Martine v. Nelson, 51 Ill. 422.

Mr. JOHN M. ROUNTREE, for appellant; against the authority of a court of equity to interfere, cited City of Galena v. Corwith, 48 Ill. 423; Brush v. City of Carbondale, 78 Ill. 74; High on Injunctions, § 403; Conrad v. Trustees of Ithica, 16 N. Y. 168; Storrs v. City of Utica, 17 N. Y. 104.

As to the powers of the Board of Commissioners: Constitu-

Harms v. Fitzgerald.

tion Art. X. § 7; Rev. Stat. 1874, 306, §§ 22, 23, 24, 25; Rev. Stat. 1874, 307, § 26; Rev. Stat. 1874, 308, § 30; Rev. Stat. 1874, 309, §§ 33, 35; Rev. Stat. 1874, 313, § 62; Meech v. City of Buffalo, 20 N. Y. 198; Dillon on Mun. Cor. § 398; Town of Guilford v. Board Sup'rs Chenango county, 13 N. Y. 143; Nelson v. Inhabitants of Mulford, 7 Pick. 18; Town of Petersburg v. Mappin, 14 Ill. 193; Augusta v. Leadbetter, 16 Me. 47; Supervisors v. Birdsall, 4 Wend.

That the decision of the board in settling disputed claims is final and cannot be reviewed: Supervisors v. Bowen, 4 Lansing, 33; Shank v. Shoemaker, 18 N. Y. 489; Russell v. Cook, 3 Ill. 504; Stover v. Mitchell, 45 Ill. 213; County v. Hunt, 5 Ohio St. 488.

Messrs. SCATES & HYNES, for appellee; insisting upon the right of a court of equity to interfere and protect the application of the funds of a municipal corporation, cited Chestnutwood v. Hood et al. 68 Ill. 132; 2 Dillon on Mun. Cor. § 731; Sherlock v. Winnetka, 59 Ill. 389; 12 Am. Law Reg. (N. S.) 150; Parr v. Att'y Gen. 8 Clark & F. 409; Grant on Cor. 138; 2 Spence Eq. 32; Colton v. Hanchett, 13 Ill. 615; Att'y Gen. v. Norwich, 12 Sim. 235.

Against the power of the Board of Commissioners to apply the funds of the county in payment of this claim: Town of Petersburg v. Mappin, 14 Ill. 193; People v. Stout, 23 Barb. 349; Perry v. Kinnear, 42 Ill. 160; 1 Dillon on Mun. Cor. 398.

Upon the question whether the original contract was still in force, and as to what the contract was: Fuller v. Little, 7 N. H. 541; Hill v. Green, 4 Peck, 114; Haywood v. Leonard, 7 Peck, 181; Bailey v. Wood, 17 N. H. 365; Weeden v. Fiske, 50 N. H. 125; De Boon v. Priestly, 1 Cal. 206; Jones v. Woodburg, 11 B. Mon. 167; Robeson v. Godfrey, 1 Holt N. P. 236; Merrill v. Ithica, etc. R. R. Co. 16 Wend. 586; Koon v. Greenman, 7 Wend. 123; McClellan v. Snider, 18 Ill. 588.

That the architect's certificate was conclusive as to the value of the deductions and extras: Korf v. Lull, 70 Ill. 420; Snell et al. v. Brown et al. 71 Ill. 133; McAuley v. Carter, 22 Ill.

Harms v. Fitzgerald.

53; Canal Trustees v. Lynch, 5 Gilm. 521; 12 Am. Law Reg. 150.

Mr. JOHN WOODBRIDGE, for appellee; that the adoption of the new plans did not abrogate the contract, cited Webster v. French, 11 Ill. 254; People v. Pearson, 1 Scam. 458; People v. Superior Court of New York, 5 Wend. 114; People v. Common Pleas, 18 Wend. 534 *Ex parte* Trapnall, 1 Eng. (Ark.) 9; People v. Contracting Board, 46 Barb. 254.

Against the power of the county board in their discretion to settle the claim of appellant, and that the court has authority to restrain by injunction: Frewin v. Lewis, 4 M. & C. 254; People ex rel. v. Common Council of Chicago, 53 Ill. 424; People v. Allen, 42 N. Y. 404; People v. Contracting Board, 33 N. Y. 382; 2 Dillon on Mun. Cor. 823; Att'y Gen. v. Poole, 4 Mylne & C. 17; Colton v. Hanchett, 13 Ill. 615; Perry v. Kinnear, 42 Ill. 160; Drake v. Phillips, 40 Ill. 388; Sherlock v. Winnetka, 59 Ill. 389; Millan v. Sharp, 15 Barb. 194; Davis v. Mayor, 1 Duer, 453.

That the decisions of the architect are binding: Korf v. Lull, 70 Ill. 420; McAuley v. Carter, 22 Ill. 53; Canal Trustees v. Lynch, 5 Gilm. 521; McAvoy v. Long, 13 Ill. 147; Packard v. Van Schoick, 58 Ill. 79; Mills v. Weeks, 21 Ill. 568; Central Military Tract R'y Co. v. Spurck, 24 Ill. 587; Wallace v. Holmes, 36 Ill. 156; People v. Stout, 23 Barb. 354; Halstead v. The Mayor, 3 Comst. 431; Hodges v. City of Buffalo, 2 Denio, 110; 2 Kent Com. 298.

MURPHY, P. J. On the 28th day of April, 1877, appellee exhibited his bill of complaint on the chancery side of the Circuit Court of Cook county, praying an injunction against the Board of County Commissioners to restrain them from paying appellant \$34,609.82, the sum which they propose to pay him as part compensation for the foundations of the Cook county court house. The prayer of the bill was granted, and a perpetual injunction decreed. From this decree, Mr. Harms appealed to this Court, and assigns for error:

First, That the court erred in decreeing that the injunction

Harms v. Fitzgerald.

against him and his co-defendants be made perpetual, and enjoining the payment to Harms of any greater sum than \$107,071.03, less \$92,692.90.

Second, That the court erred in assuming jurisdiction to settle and adjust the claim of appellant which had been already adjusted and settled by the county board.

Fourth. That the decree of the court is contrary to law and evidence in the case.

It appears that the appellant was a contractor engaged in constructing the foundations for the new court house during the years 1875 and 1876; that he had entered into a contract to that effect in the fall of 1875. After signing the contract, and after he had entered upon the performance thereof, the county made material changes in the plans it had adopted for the construction of the foundations and superstructure of the building. It appears that J. J. Egan was the architect of said building, and that appellant completed the work and extras ordered by the architect as directed. It is also claimed by the answer of appellant that he did not proceed with the work under the contract nor execute the extras under it; but on the contrary that the original contract, plans and specifications, were wholly abandoned and rescinded by consent of the parties to the same; that the county board ordered the architect to prepare entirely new and much more elaborate and costly plans, which were substituted for the original plans, and which were not accompanied by any specifications whatever as to materials or work, but appellant was required by the architect to furnish such materials and do such work as the architect might require and order from time to time; that the new plans were essentially different from the original plans in form and style of work, and were in no sense the same as the old plans with mere changes and additions, but were totally different in all their features and constituted another and different job, and the materials required under the old specifications could not be used in the building according to the new plans; that the architect, with the authority and knowledge of the board, agreed with appellant to pay him a fair and reasonable value for the work, and under this verbal agreement appellant went on and com-

Harms v. Fitzgerald.

pleted the job under the direction of the architect, and that the work and materials furnished by him were reasonably worth \$162,967.89; denies that he ever agreed that the architect should value and determine the price of the work and materials under the new plans, or that the architect has made a fair and true estimate of the work, or that there is only due the sum of \$107,071.03, less \$92,692.90 already paid; denies that the amount of \$141,689.90 allowed by the board of commissioners, was based upon the original contract, said allowance having been made on the basis of measurement and value of the whole work; and yet upon an erroneous valuation, said board having been misled in rejecting so large an amount of said appellant's claim; that it is impossible to apply the original contract or trace it in the work actually done, being so essentially different in character and details from that required by the original specifications, and finally submits that the county board had the exclusive authority by law to manage and control matters connected with the building of said court house, and to audit and settle all claims for work and materials, and denies the jurisdiction of the court to revise and correct the action of the board in the premises, or to enjoin it from exercising its legal power and discretion in regard to the same. To this answer appellee filed a general replication.

As will be seen, the issue thus formed, and the fact thus in dispute was, whether the work as actually and finally done was done in pursuance of, and in conformity to, the original contract, and whether the compensation therefor was to be ascertained and determined by the stipulations of such contract, or whether the alterations and changes so made were such a departure from such contract as to be in substitution therefor. It appears from the estimates of the architect that if the compensation for such work was to be determined by the original contract, it would amount to \$107,071.03; that after the deduction of the sum of \$92,692.90, which had been paid him, there would be still due to the appellant the sum of \$14,378.13; that if the basis of computation should be the fair market value of the work ascertained by measurement and valuation, it would be \$162,967.89. It appears that appellant presented to the

Harms v. Fitzgerald.

board his claim for payment for said work at that figure, and that the board took said proposition into consideration, and after mature deliberation voted to award him as full compensation for said work, and in full settlement of his said claim, the sum of \$141,689.80; being in excess of the amount fixed by the architect on the basis of the contract of \$34,609.82, and \$21,278.08 less than the sum claimed by appellant, to restrain the payment of which, less the sum previously paid thereon by said board, the appellee, as resident and tax-payer of the county, filed this bill.

The testimony in the case in support of the respective allegations in the bill and in the answer is in conflict, there being testimony introduced by each side tending to support said allegations respectively; and if the litigation was between the county on the one side and appellant upon the other, it might be a question more or less difficult to determine which way the testimony preponderates; but in the view taken of the case by the Court, it is not material to decide that question; or further to consider the same than to determine that it presents a question involved in uncertainty and doubt as to the facts of the case; and that being the case, we think it presents a question of the jurisdiction of a court of equity, and it is our purpose to rest our decision upon that question. By the Constitution, Art. 10, Sec. 7, it is provided that "the county affairs of Cook county shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the city of Chicago, and five from towns outside of said city, in such manner as may be provided by law."

By an act of the legislature entitled "An Act to revise the Laws in relation to Counties," approved March 31st, 1874, Sec. 22 provides that "each county which has heretofore been, or may hereafter be established in this state, according to the laws thereof, shall be a body politic and corporate, by the name and style of "The County of ——" and by that name may sue and be sued, plead and may be impleaded, defend and be defended against in any Court of Record having jurisdiction of the subject matter, either in law or equity, or other place where justice shall be administered."

Harms v. Fitzgerald.

By the 23rd Section it is provided that "the powers of the county, as a body corporate or politic, shall be exercised by a County Board, to wit: In counties under township organization (except the county of Cook) by the Board of Supervisors, which shall be composed of the town and such other supervisors as are or may be elected pursuant to law; in the county of Cook by a Board of County Commissioners, pursuant to Section 7, Article 10 of the Constitution; in counties not under township organization, by the Board of County Commissioners."

By Sec. 24 it is provided that "each county shall have power, first, to purchase and hold the real and personal estate necessary for the uses of the county, and to purchase and hold for the benefit of the county, real estate sold by virtue of judicial proceedings in which the county is plaintiff; second, to sell and convey or lease any real or personal estate owned by the county; third, to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers."

By Sec. 25 it is provided "that the County Boards of the several counties shall have power, first, to take and have the care and custody of all the real and personal estate owned by the county; second, to manage the county funds and county business, except as otherwise specifically provided; third, to examine and settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county."

By Sec. 35 of said act, it is provided that claims against the county shall be audited and paid by the board.

By Sec. 33 of said act, it is provided that "it shall be the duty of the county boards of each of the counties of this State to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties, and all suits which it may become necessary to prosecute or defend to enforce the collection of all taxes charged on the State assessment."

By Sec. 62 of said act, it is provided that "the said commissioners shall take the oath of office prescribed by the constitution. They shall have regular meetings on the first Mondays

Harms v. Fitzgerald.

of December, March, June and September of each year. They shall be known as the 'Board of Commissioners of Cook county,' and as such board of commissioners, shall have the management of the county affairs of said county, and shall exercise the same powers, perform the same duties, be subject to the same rules, regulations and penalties as prescribed by law for the board of supervisors."

Thus it will be seen that by the Constitution and laws passed in pursuance thereof, it is provided that the management of the affairs of Cook county is committed to the board of county commissioners. That being the case, it only remains to be determined whether in the performance of that duty by said board, such a state of facts has arisen as authorizes the intervention of a court of equity to control and direct such management. It will not be forgotten that the element of fraud is not involved in the case. The jurisdiction is claimed by appellee (as we understand it) upon the ground that in offering to pay the claim of appellant the board is acting without legal authority; and hence the right of the court to interfere and prevent a diversion of the public revenues to channels unauthorized by law. As will be seen, the management of the interests of the county is by law committed to their judgment and discretion, and in this case this claim was presented against the county, and its justness fully considered by said board, and in the exercise of their judgment they determined to pay, as right and proper, and as due and owing to appellant, the amount in controversy. If they had the legal authority to settle this claim, and had done so, the legality of the transaction cannot be invalidated by a lack of wisdom in the exercise of such power, there being no fraud proven.

At Sec. 389 of "Dillon on Municipal Corporations," the learned author says: "Growing out of its authority to create debts and to incur liabilities, a municipal corporation has power to *settle* disputed claims against it, and the agreement to pay them is not void for want of consideration." In the case of *Nelson v. The Inhabitants of Mulford*, 7 Pickering, 18, the court hold the same doctrine. In case of *The President and Trustees of the Town of Petersburg v. William Mappin et al.*

Harms v. Fitzgerald.

14 Ill. 349, our own Supreme Court, in discussing the powers of municipalities to settle and adjust disputed controversies between itself and other parties, use the following language: "But they may sue and be sued, and take all steps necessary to assert and secure the rights of the corporation. The power to prosecute suits on behalf of the corporation, includes the power to settle the same. So the power to defend suits brought against a corporation gives them the same power of adjustment. They may compromise doubtful controversies, to which the corporation is a party either as plaintiff or defendant. The law vests them with a discretion in such matters which they are to exercise for the best interests of the corporation. A settlement of an existing controversy, if made in good faith, binds the corporation, but if collusively made it is not obligatory." To the same effect is the case of *The Town of Guilford v. Board of Supervisors of Chenango county*, 13 N. Y. 143. Also *Livingstone v. Holbrook*, 4 Barber, 14. The fact that this claim was brought before the board and was considered by it as one about which there was dispute and difficulty, and which might breed litigation of doubtful issue to the county, clothed them with the undoubted right to settle it by compromise. In the absence of any proof of fraud, corruption or dishonesty in the exercise of its authority in this respect, a court of equity has no jurisdiction to order an injunction restraining the consummation of its agreement to compromise: *Lewis Anderson v. Board of Supervisors of Knox county*, 70 Ill. 65; *Martin v. Nelson*, 51 Ill. 422.

As we have shown, the law has confided to the board of county commissioners the duty of constructing a court house, and for that purpose conferred upon it the power to contract and provide for such construction. Hence, in the necessity of the case, it must be held to confer upon the board the power to exercise the discretion of settling and adjusting claims against the county arising out of such construction; and when in its judgment the interest of the county is promoted thereby, settle and compromise claims, and thus avoid tedious, expensive and uncertain litigation on the part of the county. So in the light of these views, we think that, in the absence of fraud, the board

Sea v. Glover.

of county commissioners is the sole judge of the wisdom of compromising this claim; and that, as a consequence, a court of chancery has no jurisdiction, and that in entertaining the bill and decreeing a perpetual injunction upon said board, restraining them from the exercise of an authority and power manifestly conferred upon them by the law, the court erred. For which error the decree is reversed and the bill dismissed.

Decree reversed and bill dismissed.

SIDNEY W. SEA

V.

JOSEPH O. GLOVER.

1. **PROMISSORY NOTE—OPTION TO DECLARE THE WHOLE SUM DUE ON FAILURE TO PAY INTEREST.**—An instrument in the usual form of a promissory note, with interest coupon notes attached, but containing a clause that if default be made in the payment of any installment of interest when the same becomes due, and such default shall continue for thirty days, then the principal sum shall, at the election of the holder of said note, become due and payable, such election to be made at any time after said thirty days, without notice, is such an obligation as is denominated in law a promissory note.

2. **CONTRACT OF GUARANTY—NOT AFFECTED BY FORM OF THE NOTE.**—In construing the contract of guaranty thereon, it is immaterial whether the instrument is technically a promissory note or not. It is an obligation, the performance of which the guarantor had a right to guarantee, and the undertaking of the guarantor is that the maker of the note shall meet his undertaking according to the terms and spirit of the contract, and on a failure so to do the contract of guaranty is broken, and the liability of the guarantor arises.

3. **WHEN LIABILITY OF GUARANTOR BECOMES FIXED—NOTICE OF ELECTION.**—The guarantor is liable on his contract when the holder of the note elects to declare the whole sum due by reason of default in payment of interest, even though the principal sum is not due, by the terms of the note. Bringing suit is sufficient notice of the election of the holder of the note to declare the whole sum due.

4. **ADVANCING CAUSE—FIVE-DAY RULE.**—Taking a case from its regular place on the docket and trying it out of its order, under the provisions of a rule of the Superior Court known as the five-day rule, is erroneous, the provisions of said rule being in contravention of the Constitution, and the statute regulating practice in courts of record.

Sea v. Glover.

ERROR to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding

Messrs. McDaid & Knight, for plaintiff in error; contended that the instruments sued on were not promissory notes, and cited Story on Prom. Notes, § 113; Parsons on Bills and Notes, 38; Kelly v. Hemmingway, 13 Ill. 605; Barker v. Athern, 35 Ill. 364; Alexander v. Thomas, 16 Q. B. 383; Hurschel v. Mahler, 3 Denio, 428.

That the notes had not matured when the action was commenced: Rev. Stat. 1874, Chap. 98, § 15; Ewing v. Bailey, 4 Scam. 420; Hall v. Jones, 28 Ill. 55.

As to the contract of guaranty, and that it had reference to the maturity of the notes as indicated on their face: 2 Parsons on Bills and Notes, 125; Klein v. Currier, 14 Ill. 237; Story on Prom. Notes, §§ 21, 27, 30, 31.

That the provision in the notes, that in default in payment of interest the whole might be declared due, is in the nature of a penalty: Tiernan v. Hinman, 16 Ill. 401.

That the court had no right to order the case advanced for trial under the five-day rule: Fisher v. Nat. Bank of Commerce, 73 Ill. 34; Kidder v. Rand et al. 73 Ill. 38; Angel et al. v. Plume & Atwood Mf'g. Co. 73 Ill. 412; Griswold v. Shaw, 79 Ill. 449.

Mr. B. C. Cook, for defendant in error; upon the authority of the court to order the case advanced for trial, cited Wallbaum v. Haskin, 49 Ill. 313; Titsworth v. Hyde, 54 Ill. 386; Fisher v. Nat. Bank of Commerce, 73 Ill. 34; Smith v. Third Nat. Bank, St. Louis, 79 Ill. 118; Owens v. Ranstead, 22 Ill. 161.

MURPHY, P. J. On the fourteenth day of December, 1877, the defendant in error instituted suit in the Superior Court of Cook county against the plaintiff in error upon the guaranty of two promissory notes, the first of which is as follows:

“\$3,000.

CHICAGO, ILLINOIS, May 9, 1874.

Five (5) years after date, for value received, I promise to pay to order of myself, the principal sum of three thousand

Sea v. Glover.

dollars, with interest thereon at the rate of ten (10 per cent.) per cent. per annum, payable half-yearly, to wit: On the 9th day of November and of May in each year, until said principal sum is fully paid, and both principal and interest payable at the office of J. D. Harvey, Chicago, Illinois."

"The several instalments of interest aforesaid, for said period of five (5) years, are further evidenced by ten interest notes or coupons of even date herewith."

"It is further expressly agreed that if default be made in the payment of any one of the instalments of interest aforesaid, at the time and place aforesaid, when and where the same becomes due and payable, and such default shall continue thirty days after such instalment becomes due and payable, as aforesaid, then, and in that event, the said principal sum of three thousand dollars shall, at the election of the legal holder thereof, at once become and be due and payable, anything hereinbefore contained to the contrary notwithstanding, such election to be made at any time after the expiration of said thirty days, without notice."

"The payment of this note is secured by trust deed on real estate in Chicago, Cook county, Illinois.

MARGARET^{her}+CORCORAN."
mark.

"Witness:

CHARLES H. LAWRENCE,
O. R. GLOVER."

To which is added a power of attorney to confess judgment thereon, in the usual form.

The second of said notes is the same in terms and tenor, differing only in date and amount, bearing date July 10th, 1874, and falling due on the 9th day of May, 1879, being for the sum of \$500, with ten (10) per cent. interest, payable semi-annually, the same as the other note. Upon the back of each of said notes is the following guaranty:

"For value received I hereby guaranty the payment of the within note at maturity, waiving notice and protest, with interest at ten (10) per cent. per annum till paid, and all costs and expenses paid or incurred in collection of the same.

"(Signed) S. W. SEA."

Sea v. Glover.

To the declaration filed in said case, the plaintiff in error pleaded the general issue, and filed therewith his affidavit of merits as required by the statute; and afterwards on the 15th day of March, 1878, being the March term of said court, the court on motion of the defendant in error, advanced said cause out of its order upon the docket, impaneled a jury, and tried and disposed of the same, resulting in a verdict and judgment against the plaintiff in error, to which he excepted and brings the record here on error, and asks a reversal upon the grounds, first, that the court erred in advancing said cause out of its order on the docket against the objections of the plaintiff in error; second, that the court erred in ordering said cause to be tried out of its order on the docket; and that the evidence does not sustain the verdict. There are many other errors assigned, a consideration of which is deemed unnecessary.

It is urged by the plaintiff in error that the suit is prematurely brought upon the guaranty against the plaintiff in error; that by the terms of the notes they would mature on the 9th day of May, 1879, and insists that the import and extent of his undertaking as guarantor was that he would pay said notes if they were not paid by the maker at that time, and that he is not liable upon his guaranty to pay said notes sooner, notwithstanding the holder should, in pursuance of the stipulations contained in said note, declare the whole, both principal and interest, due for the non-payment of the interest for a period of thirty days or upward, and that his obligation imposes no liability upon him to pay sooner than the 9th of May, 1879. It is also insisted by him that the obligation guaranteed by him is not a promissory note, and is therefore not to be governed by the rules of law applicable to such obligations. We have examined the authorities to which we have been referred upon that subject, and reached the conclusion that it is such an obligation as is denominated by the law a "promissory note," and as such negotiable; but for the purposes of this determination we regard it as wholly immaterial whether it be technically a promissory note or not; it is an undertaking; it is a contract, as admitted by the plaintiff in error, for the payment of money; it is an obligation, the performance of which he had a right to

guaranty, and we think the contract of guaranty is broken whenever the maker fails to perform any material part of the contract thus guaranteed. The undertaking of the plaintiff in error is, that the maker of the note shall meet her undertaking according to the terms and spirit of her contract; she not having done so, his contract of guaranty is broken, and his liability thereupon arises. *Hall v. Jones*, 32 Ill. 38.

By the terms of the note, if the interest remain unpaid for 30 days, it became the right of the holder to elect to declare the same due. He held said note for 30 days then, giving 3 days of grace, and then declared the entire note due; but it is insisted by the plaintiff in error, that he should have had notice of such election before suit brought. We think there is nothing in this point. A note payable on demand has been held to become due by bringing suit thereon, thus treating the suit as a demand, at once making the note due and proceeding to its collection by the same acts. *Supra*.

To the same effect our own Supreme Court have held in several cases, so that we think the holder of this note had the right to declare it due, as he did, and that the bringing of suit was notice of such election.

The question raised by the first assignment of error, namely, the advancement of the case out of its order upon the docket under the following rule: "Ordered, that in any case *ex contractu* pending on an issue or issue of fact only, or only requiring the similiter to be added, if the plaintiff or an attorney or agent of the plaintiff shall make an affidavit that he or she believes the defense is made only for delay, the plaintiff by giving the defendant's attorney or the defendant, if he or she do not appear by attorney, five days' previous notice, with a copy of such affidavit, that the plaintiff will bring on said case for trial at the opening of court on a day to be specified in said notice, or as soon thereafter as the court will try the same, may proceed to a trial, at the time specified in said notice, unless it shall be made to appear to the court by affidavit of facts in detail, that the defense is made in good faith, when the case will remain to be tried in its regular order on the trial calendar," is a question which we had considered settled by

Sea v. Glover.

this court and the Supreme Court of the State; but it is urged by distinguished counsel with great ingenuity and plausibility, that the question is yet an open one, and insists that the holdings of the Supreme Court in the case of *Smith v. Third National Bank of St. Louis*, 79 Ill. 120, is at variance with that of *Fisher v. National Bank of Commerce*, 73 Ill. 34, and the case of *Angel v. Manufacturing Company*, Id. 412. The learned counsel for the defendant in error, refers to the cases of *Wallbaum v. Haskins*, 49 Ill. 314, and *Titsworth v. Hyde*, 54 Ill. 386, as instances in which this same rule was held valid by that court. This was at a time when such rule contravened no constitutional provision or express law, and when the right was accorded to courts of general jurisdiction to regulate in great measure, rules of practice of their own court; but since the adoption of Section 29, Article 6, of the present constitution, providing that "all laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law * * * shall be uniform," it is obvious that a different rule must prevail.

By an act in regard to practice in Courts of Record, approved February 22d, 1872, it will be seen that the legislature has assumed to regulate by law the practice in the Circuit Courts of this State and the Superior Court of Cook county; and if it shall be found that this rule prescribes a practice different from that prescribed by the legislature, it will follow that it is illegal and void. It having been provided by the 14th and 15th sections of said act, that civil cases shall be set down by the clerk upon the docket according to the date of their commencement, and be apportioned for as many days of the term as he may think necessary, to be directed by the judge, to which time all subpoenas shall be made returnable. And by the 16th section, "All causes shall be tried or otherwise disposed of in the order they are placed on the docket, unless the court for good and sufficient cause shall otherwise direct."

The 36th section provides: "If a plaintiff in any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his

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demand and the amount due him from the defendant after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant or his agent or attorney, if the defendant is a resident of the county in which suit is brought, shall file with his plea an affidavit stating he verily believes he has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and if a portion, specifying the amount (according to the best of his judgment and belief). Upon good cause shown, the time for filing said affidavit may be extended for such reasonable time as the court shall order; no affidavit of merits need be filed with a demurrer or plea in abatement or motion, provided if the plaintiff, his agent or attorney shall file an affidavit stating that affiant is taken by surprise by such plea and affidavit of merit, and that he believes that plaintiff has testimony to support his claim against the defendant which he cannot produce at that term of court, but expects to produce by the next term, the court shall continue such cause until the next term." As the Supreme Court say in *Fisher v. National Bank of Commerce*, page 37, the matters to which the rule of the court and this section relate would thus seem to be the same, namely, the taking up and disposing of actions *ex contractu* out of their regular order on the docket when there is no substantial defense. The practice in this class of cases therefore under the rule of the Superior Court is different from what it is in the Circuit Court under the statute, and these courts are of the same class or grade. If the plaintiff believes there is no valid defense to his claim and desires speedy judgment under the statute, he must file an affidavit with his declaration, showing the nature of his demand and the amount due him from the defendant, after allowing all just credits, deductions and set-offs, if any. But under the rule of the Superior Court he is simply required to make affidavit that he believes the defense is made only for delay; and the defendant in such case, before the time of going to trial under the statute, is only required to file an affidavit with his plea, stating that he verily believes he has a good defense to the suit upon the merits, while under the rule

Sea v. Glover.

of the Superior Court, he is compelled to make it appear to the court by affidavit of facts in detail that the defense is in good faith. The practice being regulated by law, must under the Constitution be uniform, and from whatever source the Superior Court may have assumed its authority to adopt the rule, inasmuch as it is in conflict with a general law, it is void and of no effect. A remedy is provided by this statute for parties having a meritorious cause of action *ex-contractu*, by which he can obtain a speedy disposition of his cause, he can by filing an affidavit with his declaration showing the nature of his demand and the amount due him from the defendant, after allowing the defendant all his just credits, deductions and set-offs, and if the defendant does not then file an affidavit of merits with his plea, he is entitled to judgment by default. The practice being regulated in this respect by law, must, by the Constitution, be uniform in all courts of the same class or grade. And the Superior Court of Cook county is of the same "class or grade" of the Circuit Court of this state. In the light of these authorities from our own Supreme Court we cannot entertain a doubt that the rule in question and by virtue of which this case was advanced upon the docket and tried out of its order, contravenes the plain provision of the law regulating the practice in that regard founded upon the Constitution as above quoted. This court at this term in the case of Nelson v. Akeson, had this subject before it, and after mature consideration held the foregoing rule to be inoperative and void. It only remains to be seen whether the position taken by the learned counsel for the defendant in error, that the two cases above referred to are overruled by the same court in the case of Smith v. Third National Bank of St. Louis, 79 Ill. 118 is borne out by a proper interpretation of the decision in that case. It is urged by the defendant in error that that case is in all respects the same in principle as the one under consideration, and that the decision in that case is decisive of this. That was a case appealed from the Superior Court of Cook county to the Supreme Court, and one of the errors assigned was that the cause had been advanced and tried out of its order upon the docket. But it does not appear from the case that it was so

advanced by virtue of the rule in controversy in this case; and the court in that case say: "Whether the rule which had previously been adopted in relation to the practice in that court, contravened any provision of the Constitution, or whether it was inconsistent with the existing Practice Act, are not pertinent inquiries in the view we have taken." It is not doubted that the statute has conferred power upon the Circuit Court and the Superior Court of Cook county, for good and sufficient cause to advance and try a case out of its order upon the docket. The objection is, that by a rule uniform in its application to all cases coming within its purview, amounting as it were, to a law of that court—and in that differing from the exercise of discretionary power contemplated by the statute, to advance a case for trial for good and sufficient cause shown.

In that case, upon notice given, an affidavit was filed in substance that a defense was being made for delay. No counter affidavits were filed. Properly enough the court might adjudge defendant had no defense whatever to the action. Such an inference was warranted by the silence of the defendant. Had he shown cause against the motion; the presumption will be indulged, the court would not have advanced the trial. Parties will not be permitted to captiously refuse to show cause against such a motion, and then invoke the equitable interposition of the court in their behalf. "Under the circumstances the court decided there was 'good and sufficient cause' for an immediate trial, notwithstanding the cause had not been regularly reached on the call of the docket, and under the statute, independently of any rules of court, it had the clear authority to so order. Nothing was shown against the motion, and, it not appearing defendant had any defense whatever to the action, there was no abuse of a sound discretion."

In this case, as distinguished from that, the defendant filed his affidavit of merits as required by the statute, notwithstanding which the case was advanced out of its order on the docket and tried by virtue of this rule, which we have shown to contravene the Constitution and the law of the State, and therefore to be of no effect; and we think there is nothing in the case of *Smith v. Third National Bank of St. Louis* that in any way

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

conflicts with the decisions upon that subject first above referred to, both of the Supreme Court and this Court. So in the light of these authorities, we think it was error to advance and try said cause by virtue of said rule out of its order on the docket, for which error the judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

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THE PHILADELPHIA FIRE INSURANCE COMPANY ET AL.
v.

THE CENTRAL NATIONAL BANK OF CHICAGO ET AL.

1. CREDITOR'S BILL.—OFFICE OF—EXTENT OF EQUITY JURISDICTION IN.—Although a creditor's bill filed pursuant to a statute is a bill for relief as well as discovery, the relief seems to be made dependent upon the discovery; and when the answer to such bill discovers assets of the judgment creditor in the hands of the defendant, a court of chancery may apply such assets to the payment of the judgment. But where the answer not only fails to discover, but denies the possession of assets, the allegations in the answer cannot be traversed, and the court of chancery proceed to try such traverse and grant relief in case the defendant is proved to be in possession of assets of the judgment creditor.

2. JURISDICTION IN CASE OF FRAUD.—Where a bill in the nature of a creditor's bill is filed for the purpose of setting aside a fraudulent conveyance of property, a court of chancery obtains jurisdiction on the ground of fraud, as against all parties in any way chargeable with the perpetration of the fraud, and in such a case the court of chancery will wrest the property so fraudulently conveyed, from the possession of the guilty parties, and hand it over to the creditors to whom it rightfully belongs.

3. PARTIES NOT CHARGED WITH FRAUD.—Where, however, no fraud is charged in the bill as to particular defendants, and no other ground of equitable jurisdiction is alleged beyond a mere allegation of possession of assets, or indebtedness to the judgment debtor, and the answer traverses such allegations, the bill cannot be maintained as against such defendants.

4. STATEMENT—PRACTICE IN CERTAIN CASES.—The complainants charged certain of the defendants with a fraudulent conveyance of property, and with fraudulently procuring an insurance thereon in the name of one of the defendants, and charged a secret trust in favor of the judgment debtor; they also alleged a liability on the part of the defendant insurance companies to pay for losses on policies issued by them, and sought in their bill to reach

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

the insurance so claimed to be due. It was not charged that the insurance companies participated in the fraud. The insurance companies answered, denying any liability on their policies. Under such a state of facts the court has power to order an assignment of the policies to a receiver, and clothe him with authority to bring suits at law for the recovery of the insurance so claimed to be due. It has no authority, as in this case, in a suit in the nature of a creditor's bill, to try the question of the liability of some thirty different defendant insurance companies upon policies issued by them, and order a payment of the insurance, and thus deprive the defendants of a separate trial by jury.

APPEAL from the Superior Court of Cook county ; the Hon. SAMUEL M. MOORE, Judge, presiding.

Mr. HENRY C. WHITNEY, and Mr. E. R. BOWEN, for appellants; against the jurisdiction of a court of equity to compel the insurance companies to try their cases in that forum, and contending for the right to a trial at law, cited Rev. Stat. Chap. 22, § 40.

That as to the insurance companies the action was premature, the losses by the terms of the policies not being due: Nickerson v. Babcock, 29 Ill. 497; Daniels v. Osborn, 71 Ill. 169.

That the policies were void on account of concealment of facts material to the risk: Day v. Charter Oak Ins. Co. 4 Benn. Ins. Cas. 727; Boggs v. Am. Ins. Co. 4 Benn. Ins. Cas. 464; Phillips on Insurance, 277; Gould v. Ins. Co. 47 Me. 403; Carpenter v. Ins. Co. 1 Story, 57; Columbian Ins. Co. v. Lawrence, 2 Pet. 25; Smith v. Williams, 2 Caines' Cas. 110; Lee v. Ins. Co. 3 Gray, 583; 1 Phillips on Insurance, 304; 4 Benn. Ins. Cas. 481.

That the assured must own the property or have an insurable interest therein: Busch v. Sinnissippi Ins. Co. 28 Ind. 64; Sawyer v. Mayhew, 51 Ill. 398; Fowler v. New York Ins. Co. 26 N. Y. 422; Peabody v. Washington Ins. Co. 20 Barb. 339; Freeman v. Fulton Ins. Co. 38 Barb. 247; Tallman v. Atlantic Ins. Co. 29 How. Pr. 71; Sweeney v. Franklin Ins. Co. 20 Pa. St. 337.

If the assured have no interest, it will be a mere wager policy, and void: Howard v. Ins. Co. 3 Denio, 303; In the matter of Kip, 4th ed. Ch'y, 94; Ætna Ins. Co. v. Tyler, 16 Wend. 285; Trader Ins. Co. v. Robert, 9 Wend. 404; Power

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

et al. v. Ins. Co. 19 La. 23; Tittmore v. Ins. Co. 20 Vt. 546.

That a policy of insurance is a personal contract of indemnity with the insured: McCarty v. Com. Ins. Co. 17 La. 365; Leavitt v. W. M. & F. Ins. Co. 7 Rob. 351; Marchesseau v. Ins. Co. 1 Rob. 438; Wyman v. Prosser, 36 Barb. 368; Strong v. Ins. Co. 10 Pick. 49; Wilson v. Hill, 3 Met. 66; Carpenter v. Ins. Co. 16 Pet. 495; Adams v. Ins. Co. 29 Me. 292; 3 Benn. Ins. Cas. 31.

Evidence offered tending to show that had the underwriters known the premises contained machinery for carrying on a business so hazardous as to be uninsurable, they would not have taken the risk, should have been admitted: Webber v. Eastern R. R. Co. 2 Met. 147; Luce v. Dorchester Ins. Co. 105 Mass. 297; Hawes v. New England Ins. Co. 2 Curtis C. C. 229; Mulvey v. Mohawk Valley Ins. Co. 5 Gray, 541; Merriam v. Middlesex Ins. Co. 21 Pick. 162; Daniels v. Hudson Riv. Ins. Co. 12 Cush. 416; McLanahan v. Universal Ins. Co. 1 Pet. 170; Mitchell v. Home Ins. Co. 32 Iowa, 421; Kern v. St. L. Mut. Ins. Co. 40 Mo. 19.

Mr. HENRY J. PEET and Mr. PERRY H. SMITH, JR., for appellants; that the answers having denied any indebtedness, a court of chancery had no jurisdiction to try that traverse, cited Sherwood v. Ins. Co. 12 How. 136; Hitt v. Ormsbee, 14 Ill. 233; Rodman v. Henry, 17 N. Y. 484; Walker's Ch. R. 2; Story's Eq. Jur. § 74; N. Y. Code § 299; Rev. Stat. N. J. 76; Rev. Stat. N. C. 209; 3 Corwin (Ohio) Chap. 1, 202; Welch v. P. Ft. W. & C. R. R. Co. 11 Ohio 573.

That the insured cannot recover an amount greater than their insurable interest: Smith v. Columbia Ins. Co. 17 Pa. St. 253; Strong v. Ins. Co. 10 Pick.; Catron v. Ins. Co. 6 Humph. 176; Reed v. Mut. Safety Ins. Co. 3 Sandf. 54; Smith v. Williams, 2 Caines' Cas. 110.

That there were material concealments regarding title and interest: Catron v. Ins. Co. 6 Humph. 176; Columbian Ins. Co. v. Lawrence, 2 Pet. 25; Lycoming Ins. Co. v. Stockbomer, 2 Casey, 199; Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 368; Elliott v. Lycoming Ins. Co. 66 Pa. St. 22; Lee v. Howard

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

Ins. Co. 11 Cush. 224; Com. Ins. Co. v. Mehlman, 48 Ill. 313; Wethrall v. City Ins. Co. 16 Gray, 276; Tomlinson v. Monmouth Mut. Ins. Co. 47 Me. 232; Flanders on Fire Insurance, 68.

That the suit was prematurely brought, the loss not being then due and payable by the terms of the policies: Chamberlain v. McCall, 2 Yeates, 281; Bryant v. Ins. Co. Pick. 131; Davis v. Davis, 49 Me. 282.

Upon the question of payment of interest decreed by the court: Delonguemare v. Ins. Co. 2 Hall, 589; Nevins v. Rockingham Ins. Co. 25 N. H. 22.

Messrs. MATTOCKS & MASON and Mr. GEO. W. SMITH, for the Central Nat. Bank, appellee; contending for the equitable jurisdiction of the court, cited Rev. Stat. 1874, 203; Gage v. Smith, 79 Ill. 219; Bramhall v. Ferris, 14 N. Y. 45; Donovan v. Finn, 1 Hopk. Ch. 59; Hadden v. Spader, 20 Johns. 554; Pettit v. Chandler, 3 Wend. 621; Bailey v. Burton, 8 Wend. 339; Tappan v. Evans, 11 N. H. 326; Beck v. Burdett, 1 Paige Ch. 309; Weed v. Pierce, 9 Cowen, 722; Durand v. Hankesson, 39 N. Y. 287; Grant v. Redd, 4 B. Mon. 178.

A court of equity having properly acquired jurisdiction over the subject matter, will do final and complete justice between the parties: Taylor v. Mer. Fire Ins. Co. 9 How. 405; Motteaux v. London Assurance Co. 1 Atkins, 545; Perkins v. Washington Ins. Co. 4 Cowen, 646; 1 Duer, 66; Fireman's Ins. Co. v. Powell, 13 B. Mon. 311; Phoenix Ins. Co. v. Mitchell, 67 Ill. 43; Wood on Fire Insurance, 32.

Against the objection that the suit was prematurely brought, because the sixty days for payment of losses had not expired: *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Aurora Fire Ins. Co. v. Eddy* 55 Ill. 213; *Ill. M. F. I. Co. v. Archdeacon*, 82 Ill. 236.

That the policies were not void by reason of non-insurable interest in the assured, and because hazardous non-insurable material and machinery were used in the building: *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *Insurance Co. v. Slaughter*, 12 Wall. 404; *Aurora*

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

Ins. Co. v. Eddy, 49 Ill. 106; Ins. Co. of North America v. McDowell, 50 Ill. 120; New England F. & M. Ins. Co. v. Wetmore, 32 Ill. 221; Schmidt v. Peoria M. & F. Ins. Co. 41 Ill. 296.

That a clause in a policy forbidding a sale of the property is not affected by a mortgage of the same: Commercial Ins. Co. v. Spankneble, 52 Ill. 53; Smith v. Mutual F. Ins. Co. 50 Me. 96; Masters v. Madison Ins. Co. 11 Barb. 624; Rollins v. Columbia Ins. Co. 5 Foster, 204; Ayers v. Hartford Ins. Co. 17 Iowa, 180; Fireman's Ins. Co. v. Cong. Rodeph Sholom, 80 Ill. 558; Aurora F. Ins. Co. v. Eddy, 55 Ill. 213; Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302.

That if any of the conditions in the policy had been violated, it was the duty of the company to make known the ground of objection at the time of adjustment of the loss: Atlantic Ins. Co. v. Wright, 22 Ill. 462; Peoria F. & M. Ins. Co. v. Lewis, 18 Ill. 553.

As to what constitutes an insurable interest: Commercial Ins. Co. v. Spankneble, 52 Ill. 53; Rockford Ins. Co. v. Nelson, 65 Ill. 415; Atlantic Ins. Co. v. Wright, 22 Ill. 462; Mitchell v. McDougall, 62 Ill. 498; Phoenix Ins. Co. v. Mitchell, 67 Ill. 43; Vansant v. Allmon, 23 Ill. 30.

The pretended chattel mortgages were void as against creditors: McDowell v. Stewart, 9 Chicago Legal News, 181; Frank v. Miner, 50 Ill. 444; Porter v. Dement, 35 Ill. 478; Gross' Stat. 67, §§ 2, 3.

That the property in dispute is presumed to belong to the husband, and the burden of proof is upon the wife to show affirmatively that it is her separate property: Jassoy v. Delius, 65 Ill. 469; Indianapolis R'y Co. v. McLaughlin, 77 Ill. 275; Reeves v. Webster, 71 Ill. 307; Patton v. Gates, 67 Ill. 164; Wilson v. Loomis, 55 Ill. 352; Elijah v. Taylor, 37 Ill. 247; Wortman v. Price, 47 Ill. 22; Brownell v. Dixon, 37 Ill. 187; Seitz v. Mitchell, 4 Otto, 580; Kahn v. Wood, 82 Ill. 219; Sweeney v. Damron, 47 Ill. 450; McLourie v. Partlow, 53 Ill. 340; Haines v. Haines, 54 Ill. 74; Bridgeford v. Riddell, 55 Ill. 261.

That a subsequent creditor may attack a conveyance from

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

husband to wife if the conveyance was made to defraud creditors and the husband insolvent at the time: *Bridgeford v. Riddell*, 55 Ill. 261; *Moritz v. Hoffman*, 35 Ill. 553; *Phelps v. Curts*, 80 Ill. 109; *Mills v. Morris*, 1 Hoffman's Ch. 419; *Richards v. Smallwood, Jacobs*, 556; *Rigway v. Underwood*, 4 Wash. C. C. 137; *Sexton v. Wheaton*, 8 Wheat. 229; *Savage v. Murphy*, 34 N. Y. 508; *Case v. Phelps*, 39 N. Y. 164; 10 N. Y. 227; *Seward v. Jackson*, 8 Cowen, 406; 19 Barb. 450; 7 Bos. 480; *Jones v. King*, 10 Chicago Legal News, 275; *Bump on Fraudulent Conveyances*, 331; *Hook v. Monroe*, 17 Iowa, 197; Rev. Stat. 251.

That the insurance companies were liable to pay interest from the time the money became due: *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Peoria F. & M. Ins. Co. v. Lewis*, 18 Ill. 553.

As to testimony of the inflammable nature of the materials used in the building, and that they did not increase the hazard: *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Wood v. Northwestern Ins. Co.* 46 N. Y. 421; *Wood on Fire Insurance*, 366.

That the rights of the intervening petitioners were subordinate to those acquired by this appellee: 2 Johns. Ch. 156; 1 Johns. Ch. 302, 575; 8 Chicago Legal News, 379.

Upon the question whether the machinery attached to the building was real or personal property: *Swift v. Thompson*, 9 Conn. 63; *Gale v. Ward*, 14 Mass. 352; *Walker v. Sherman*, 20 Wend. 636; *Sheldon v. Edwards*, 35 N. Y. 283; *Ford v. Cobb*, 20 N. Y. 348; *Dunham v. Sankey*, 38 Iowa, 369; 2 Kent Com. 409; *Sowdan v. Craig*, 26 Iowa, 156; *Ballou v. Jones*, 37 Ill. 95; *Winslow v. Mer. Ins. Co.* 4 Met. 306; *Kelly v. Austin*, 46 Ill. 156; *Arnold v. Crowder*, 81 Ill. 56; *Jones on Mortgages*, 444.

Messrs. GRANT & SWIFT, for Travelers Insurance Co., appellee; argued that the court had jurisdiction, and would retain it for all purposes, and cited 2 Story's Eq. 1216 b.; *Steere v. Hoagland*, 39 Ill. 264; *Nente v. Duke of Marlborough*, 2 Myl. & C. 407; *Hodden v. Spader*, 20 Johns. 554; *Craig v. Hone*, 2 Edw. Ch. 566; 2 Barb. Ch. Pr. 147; Rev. Stat. Chap. 22, § 49; *Savage v. Berry*, 3 Scam. 545; *People ex rel. v. Chicago*, 53

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

Ill. 424; *Sherlock v. Winnetka*, 59 Ill. 389; *Morgan v. Roberts*, 38 Ill. 65; *Mitchell v. McDougall*, 62 Ill. 498.

Upon the remedies of the holder of the chattel mortgage: *Herman on Chattel Mortgages*, § 206; *Packard v. Kingman*, 11 Iowa, 219; *Devens v. Bower*, 6 Gray, 126; *Jackson v. Hull*, 10 John. 481; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; *Dupuy v. Gibson*, 36 Ill. 197.

That there was no concealment sufficient to avoid the policies, there being no written application; and that unused machinery did not increase the hazard: *Lycoming Ins. Co. v. Jackson*, 83 Ill. 302; *Schmidt v. Peoria M. & F. Ins. Co.* 41 Ill. 296; *Andes Ins. Co. v. Shipman*, 77 Ill. 189; *Peoples Ins. Co. v. Spencer*, 53 Pa. St. 353; *James River Ins. Co. v. Merritt*, 47 Ala. 387; *Wood on Fire Ins.* 434.

That provisions of forfeiture in policies of insurance are to be strictly construed: *Wood on Fire Insurance*, 141; *Kentucky Mut. Ins. Co. v. Jencks*, 5 Ind. 96.

As to insurable interest of person who has the legal or equitable title to property insured: *Stephens v. Illinois Ins. Co.* 43 Ill. 327; *Cone v. Niagara Ins. Co.* 60 N. Y. 619; *Strong v. Manufacturers Ins. Co.* 10 Pick. 40; *Insurance Co. v. Barney*, 20 Wall. 159; *Phoenix Ins. Co. v. Mitchell*, 67 Ill. 43; *Eastern R. R. Co. v. Relief Ins. Co.* 105 Mass. 570; *Lycoming Ins. Co. v. Jackson*, 83 Ill. 303; *Wyman v. Peoples Ins. Co.* 1 Allen, 301; *Home Mut. Life Ins. Co. v. Garfield*, 60 Ill. 124; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Rice v. Provincial Ins. Co.* 7 U. C. (C. P.) 548; *Ayres v. Home Ins. Co.* 21 Iowa, 185; *Washington Ins. Co. v. Hayes*, 17 Ohio St. 432; *Waring v. Loder*, 1 Rob. 55; *Wood on Fire Insurance*, 475; *Ill. Cen. R. R. Co. v. McCullough*, 59 Ill. 166; *Brown v. Gaffney*, 28 Ill. 150.

To avoid a policy on the ground of alienation, the fact of such alienation must be shown, and the burden of proof is upon the insurers: *Catlin v. Springfield F. & M. Ins. Co.* 1 Sumner, 434; *Orrell v. Hampden F. & M. Ins. Co.* 13 Gray, 431; *Shepherd v. Union Ins. Co.* 38 N. H. 232.

In support of the ruling of the court excluding certain questions asked of witnesses: "Would you have insured the prop-

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

erty had you known there was a tax-deed outstanding against the property?" etc.: *Sturm v. Williams*, 6 Jones & S. 325; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256; *Schmidt v. Peoria F. & M. Ins. Co.* 41 Ill. 296; *Washington Life Ins. Co. v. Haney*, 10 Kan. 525; *Wood on Fire Insurance*, 858; *Lee v. Howard Fire Ins. Co.* 11 Cush. 324; *May on Insurance*, § 374.

Upon the question of the machinery being fixtures, and passing with the real estate: *Hoskin v. Woodward*, 45 Pa. St. 42; *Brenan v. Whitaker*, 15 Ohio St. 446; *Ex parte Montgomery*, 4 Irish Ch. (N. S.) 520; *Citizens' Bank v. Knapp*, 22 La. An. 117; *Theurer v. Neutre*, 23 La. An. 749; *Sparks v. State Bank*, 7 Ind. 468; *Græme v. Cullen*, 23 Gratt. 266; 1 Jones on Mortgages, § 435; *In re Sands' Ale Brewing Co.* 3 Biss. 175.

That insurance is a personal contract: *Cummins v. Cheshire Mut. F. Ins. Co.* 55 N. H. 457; *Wood on Fire Insurance*, § 436; *Carpenter v. Ins. Co.* 16 Pet. 495; *Lucena v. Crawford*, 2 Bos. & Pull. 240; *Bernheim v. Beer*, Cent. Law Jour. 485; *May on Insurance*, 5; *Wilson v. Hill*, 3 Met. 66; *Sadlers' Co. v. Budcock*, 2 Atk. 554.

BAILEY, J. On the 27th day of January, 1875, the Central National Bank of Chicago recovered a judgment in the Superior Court of Cook county against Albion K. Norris and the Norris Planing Mill and Lumber Company, for the sum of \$4,778.59 and costs. On this judgment an execution was duly issued to the sheriff of Cook county, and by him returned wholly unsatisfied. Afterwards, on the fifth day of April, 1875, the Central National Bank filed in said court a creditor's bill against said judgment debtors, and Eliza T. Norris, wife of said Albion K. Norris, Leavitt Fifield, Nathaniel Y. Trickey and the Travelers' Insurance Company of Hartford, Connecticut, seeking thereby to subject to the payment of said judgment certain equitable assets of the judgment debtors.

The property sought to be reached by the bill consisted of certain lots of land in Chicago, together with a planing mill situate thereon, and the machinery, engines, boilers and other personal property belonging thereto. The situation of this

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

property as disclosed by the record was substantially as follows: On the 24th day of April, 1871, Albion K. Norris, claiming to act as the agent of his wife, purchased said property of the Fifth National Bank of Chicago, for the sum of \$24,000, and procured a conveyance thereof to Mrs. Norris. To raise \$15,000 of the purchase money he borrowed that sum of the Travelers' Insurance Company, giving his own personal bond therefor in the penal sum of \$30,000, conditioned for the payment of the money so borrowed in five years, with ten per cent. interest, payable semi-annually, and to secure said bond Norris and wife executed to one Julius White, as trustee, a deed of trust of said premises, which, with the consent of the Fifth National Bank, was made a first lien thereon. To secure to said bank the balance of said purchase money, Norris and wife also executed a junior deed of trust of said premises to one William H. King, as trustee.

At the time of this purchase Norris was insolvent, and this fact seems to have furnished the reason for taking the title to the property in the name of Mrs. Norris. Shortly after the purchase, Mr. Norris took possession of the planing mill and its equipments, and run and operated the same apparently in his own behalf and for his own benefit, using in so doing the sum of \$6,000, loaned him by a friend in Boston. In September, 1871, a fire occurred by which said planing mill and machinery were partially destroyed. The property at the time was insured for a considerable amount, a part of said insurance being for the benefit of the Travelers Insurance Company, but owing to the insolvency of the insurance companies consequent upon the great fire of October 9th, 1871, only a small amount of insurance money was realized. The mill was subsequently repaired and supplied with new machinery by the use of said insurance money, and other funds advanced, as Mrs. Norris claims, by her, out of moneys received from her father's estate.

Afterwards, in pursuance of an agreement made when said \$15,000 loan was negotiated, Mrs. Norris, to further secure said loan, on the 9th day of December, 1871, executed to the Travelers Insurance Company a chattel mortgage of certain of the machinery and personal property in said planing mill,

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

which chattel mortgage was renewed on the 15th day of June, 1873, and again on the 16th day of June, 1875. The renewal of June 15th, 1873, was never recorded, and the renewal of June 16th, 1875, though recorded, was not executed until after the service of process in this suit.

Mr. Norris continued in charge of the business of the planing mill until sometime in the year 1872, when he, together with certain other persons, organized a corporation under the name of "The Norris Planing Mill and Lumber Company," which corporation, with said Norris as its president, thereafter carried on said business under a lease from Mrs. Norris.

About the first of March, 1873, Leavitt Fifield, as he claims, loaned for the period of one year the sum of about \$10,000 in cash, to be used in the business of said company, for which he was to receive interest at the rate of ten per cent. per annum, and in consideration of such loan it was arranged that the business of the planing mill should be carried on by said corporation, with Norris as its president and Fifield as its secretary, and that after paying Mrs. Norris an annual rent of \$3,600, and defraying all the other expenses and liabilities of said business, the net profits should be divided equally between Fifield and Mrs. Norris. By way of security for this loan, Norris and wife conveyed to Fifield said planing mill and all the machinery therein. Sometime after the commencement of this suit Fifield conveyed said property to his brother, Elbridge G. Fifield and one A. T. Hall—six-sevenths to the former and one-seventh to the latter. Afterwards the interest of said Hall was conveyed to said Elbridge G. Fifield, thus vesting in the latter the entire interest acquired under the deed to Leavitt Fifield. These deeds were both absolute on their face, but were understood by the parties thereto to be given merely as security for money loaned. A considerable portion of the Fifield loan seems to have been paid, and the record discloses a controversy between the Fifields and Mr. and Mrs. Norris as to whether any and how much remains in arrears, the former claiming a balance of from \$6,000 to \$7,000, and the latter claiming satisfaction thereof in full.

After the termination of the Fifield contract, and about the

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

first of July, 1874, Nathaniel Y. Trickey claims to have loaned Mrs. Norris about \$12,000, taking as security a portion of the machinery in the planing mill, and about the first of February, 1875, this loan was changed into the form of an absolute purchase of said machinery from Mrs. Norris, with an agreement on the part of said Trickey to keep said machinery insured for the benefit of the Travelers Insurance Company, he having taken said property subject to the chattel mortgage thereon to said company.

The good faith of these transactions with both Trickey and the Fifields is called in question by the complainant, it being claimed that said loans were merely fictitious, and the conveyances to them without consideration, and that they as well as Mrs. Norris had no beneficial interest in said property, but in fact held the same for the benefit of Mr. Norris, and under a secret trust for his use.

Such being the situation and condition of the property in controversy, on the fourth day of October, 1876, and while this suit was pending and undetermined in the court below, a fire occurred by which said planing mill was totally destroyed, and the machinery, fixtures and personal property therein destroyed or greatly damaged. At the time of said fire said property was insured to the amount of about \$21,000, by policies of insurance issued by some thirty different insurance companies. A portion of these policies, amounting in the aggregate to something over \$11,000, were issued to Mrs. Norris. These policies seem to have been obtained through the instrumentality of Mr. Norris, acting as the agent, or pretended agent, of his wife. Of these policies running to Mrs. Norris, a part had written upon their face the following clause: "Loss, if any, payable to Julius White, trustee, as his interest may appear," and the residue were without such clause written therein. The remaining portion of said policies, amounting in the aggregate to nearly \$10,000, were issued to said Trickey, and all or most of them had written upon their face a similar clause, making the loss, if any should occur, payable to said Julius White, trustee, as his interest might appear.

Within a few days after said fire, proofs of loss were duly

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

made by the insured under all of these policies, and on the 26th day of October, 1876, the Central National Bank, the complainant in this suit, filed an amended and also a supplemental bill, whereby, in addition to the parties to the original bill, Julius White and various other persons, and also each of the several insurance companies issuing said several policies of insurance, were made parties defendant. By these bills the complainant prayed for the appointment of a receiver, and the sale by such receiver of the lots on which said planing mill stood, subject to any valid lien there might be found to be thereon, and in case sufficient should not be realized from such sale, to satisfy the complainant's said judgment, that the proceeds of said insurance or such part thereof as should be necessary, might be applied to the payment of the residue thereof.

The Travellers Insurance Company and Julius White, answered said several bills, setting up in their answer the rights vested in said company by said deed of trust to said White, said chattel mortgage, and the clauses in said several policies of insurance, making the loss thereunder payable to said company, and afterwards filed their cross-bill, praying that an account be taken of the moneys payable to said company under said policies; that a receiver be appointed to collect the same, and that said insurance companies be ordered to pay over to such receiver the various sums found to be due from them respectively. On filing the cross-bill a receiver was appointed as therein prayed for.

These several insurance companies appeared and answered said original, supplemental and cross-bills, admitting the execution of their several policies, but denying their liability thereunder, and setting up a variety of defenses growing out of the special conditions and provisions of their respective policies, and of various acts and neglects of the parties insured; and claiming and insisting upon their right to have the question of their liability tried and determined in a court of common law. Notwithstanding the defenses thus set up, and the claim of right thus made to a trial at law, the court below overruled said claim, and proceeded to try and determine the liability of said companies under said policies, and on such trial disallowed

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

each and every of said defenses, and rendered a decree against each company for the face of its policy, less certain payments already made by part of the companies for a previous loss, and ordered each company to pay to the receiver the amount so found due from it within twenty days; or in default of payment that execution issue as at law.

From this decree eighteen of these companies have prosecuted their appeals to this Court. Although each of these companies has prayed its appeal separately, and filed its separate appeal bond, only one transcript of the record has been filed in this Court, the same being by agreement between the several appellants made use of for the purposes of their respective appeals.

The principal error assigned by these various appellants, and the only one we need consider, is the refusal of the court below to remit the question of the liability of these various companies under their respective policies, to a court of common law for trial, and its decision to try and determine all of these matters in the court of chancery.

Section 49, Chap. 22, R. S. 1874, being the section under which the bill in this case must be maintained, if at all, against these companies, provides as follows:

“Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or equity, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, *to compel the discovery* of any property or thing in action belonging to the defendant, and of any property, money or thing in action due to him, or held in trust for him, and to prevent the transfer of such property, money or thing in action, or the payment or delivery thereof to the defendant. * * * The court shall have power to *compel such discovery*, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money or thing in action belonging to the defendant, or held in trust for him, * * * which shall be *discovered* by the proceedings in chancery whether the same was originally liable to be taken in execution at law or not.”

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

A creditor's bill filed under the provisions of the foregoing section is in many of its essential features a bill of discovery. Its object is to "*compel the discovery*" of property, money or things in action in the hands of third persons belonging to the judgment debtor, or in which he is beneficially interested, and to decree payment of the judgment out of the assets so discovered. A bill of discovery, properly and technically so called, is a bill to obtain by means of a sworn answer of the defendant, a discovery of facts resting in his knowledge, or of deeds, writings or other things in his custody or power. If upon such a bill no discovery is obtained, the suit fails and the bill must be dismissed.

Although a creditor's bill filed pursuant to the statute is a bill for relief as well as discovery, the relief seems to be made dependent upon the discovery. There can be no doubt that when the answer to such bill discovers assets of the judgment debtor in the hands of the defendant, the court of chancery may, by any of the methods known to ordinary chancery practice, apply such assets to the payment of the judgment. Where, however, the answer not only fails to discover, but denies the possession of assets, can the answer be traversed, and the court of chancery proceed to try such traverse, and if upon such trial the defendant is proved to be in fact in possession of assets, grant relief by decreeing the application of the same to the satisfaction of the judgment? The plain language of the statute seems to indicate a negative answer. It is not denied that where a bill supplementary to execution, in the nature of a creditor's bill, is filed for the purpose of setting aside a fraudulent conveyance of property by the judgment debtor, or of removing such conveyance out of the way of the execution, the court of chancery obtains jurisdiction on the ground of fraud, as against all parties chargeable in any way with its perpetration. In such case the strong arm of the court of chancery may be extended to wrest from the possession of any or all of the guilty parties the property thus fraudulently conveyed, and hand it over to the creditor to whom it rightfully belongs. Where, however, as to a particular defendant no fraud is charged, and no other ground of

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

equitable jurisdiction is set up beyond a mere allegation of possession of assets of the judgment debtor, or indebtedness to him, and the answer traverses such allegation, we see no ground upon which the bill can be further maintained as against such defendant.

In the present case, the bill, so far as it seeks to charge Mrs. Norris, Trickey and the Fifields, is based upon an allegation of fraud. It is alleged that the conveyances of the planing mill and its equipments to them were fraudulent, and that they were holding the same upon a secret trust for Mr. Norris, and in fraud of his creditors. As to these defendants, the bill, if sustained by the proof, was clearly maintainable. As to the insurance companies, however, no fraud is charged; the only claim is that they are liable upon certain insurance policies issued by them to Trickey and Mrs. Norris, and that the moneys so owing from them, ought in equity to be applied to the payment of complainants' judgment against Mr. Norris. Even if procuring these policies in the name of Mrs. Norris and Trickey was fraudulent, there is no pretense that the insurance companies participated in such fraud. Had these companies, by their answer admitted their liability, unquestionably the court might have decreed payment to such of the parties as appeared equitably entitled to the insurance money. Instead of admitting their liability, however, they answered under oath, denying it and setting up a variety of defenses against the claims made by the policy holders. After the filing of these answers we think, as against them, the court of chancery should have proceeded no farther.

The course here indicated would have merely resulted in changing the forum in which to litigate the liability of these companies. As against the policy holders the court of chancery had undoubted jurisdiction. The possession by them of the policies was charged in the bill to be upon a secret trust for the use of the judgment debtor, and consequently fraudulent as to complainant, and the court seems to have found such allegations sustained by the proofs. The court then had ample power to compel the assignment and delivery of the policies to the receiver, and to clothe him with authority to

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

bring suits thereon at law. A court of law would have been a more appropriate tribunal for such litigation. There the parties could have had the benefit of a trial by jury, and the suit upon each policy could have been tried by itself, disencumbered and disembarassed of all questions growing out of the trial of other suits between other parties.

The usual methods by which courts of chancery in creditors' suits subject mere choses in action of the judgment debtor to the payment of the judgment, are by directing a sale of the chose in action itself and applying the proceeds, or by placing it in the hands of a receiver, with power on his part to resort to an appropriate tribunal for its enforcement or collection. The practice of enforcing such collection directly in the creditor's suit, if within the jurisdiction of the court, would be attended with very great inconveniences. Not only is the debtor thereby deprived of his right to a trial by jury, but the trial of the issues presented by such individual debtor becomes unavoidably encumbered and embarrassed by a multitude of other issues presented in the cases of the other parties whose suits must be tried in the same proceeding. The record in the present case is a fair illustration. We have here a document covering over twelve hundred pages, and embracing in addition to the creditor's suit itself a record of thirty suits against that number of insurance companies, for the collection of insurance money due under thirty different policies, yet so involved are all of these proceedings with each other that it is impossible to pass upon the rights of any one of these companies without investigating and considering the entire record. No one of these companies could have brought its own case to this court for review without bringing up the entire record, at an expense nearly or quite equal to the entire amount involved, and compelling this court, in order to a proper adjudication of the case, to travel over this vast maze of pleadings and evidence, of which by far the greater part would have no bearing whatever upon the questions presented by the appeal, but would only tend to confuse and obscure those portions of the record really bearing upon the case.

It is a circumstance worthy of note that the learning and

Philadelphia Fire Ins. Co. et al. v. Central National Bank of Chicago et al.

industry of the numerous able counsel, employed in this case, have failed to bring to our attention any authority directly supporting the practice adopted by the learned chancellor. Recourse is had to the familiar principle that, equity having obtained jurisdiction for one purpose, will ordinarily retain it for the purpose of administering complete and adequate relief. In illustration of this principle, we are cited to several cases where the aid of a court of equity has been invoked to compel the specific performance of a contract to issue a policy of insurance, and the court having obtained jurisdiction for that purpose, and a loss having intervened, has gone on and decreed payment of the loss. It will be observed that in all such cases the ground of jurisdiction has grown out of the relations or conduct of the very parties as against whom jurisdiction is retained for purposes of general relief. We are cited to no case where equitable jurisdiction having once been obtained as between given parties, has been retained as a basis for granting relief against other parties whose conduct and relations have not been such as, of themselves, to afford ground for equitable interposition.

So far as appears these insurance companies had committed no act by virtue of which they could be sent to a court of chancery for trial. They had dealings it is true with people whose conduct had become a proper subject of investigation by a court of chancery. For that conduct they, so far as appears, were in no way responsible. They were guilty of no fraud. The claims sought to be enforced against them were purely matters of legal cognizance. Upon what principle their right to have these cases tried by a jury, and according to the established course of the common law, should be denied them, we are unable to discover. An abridgment of their rights cannot be justified on the ground that other parties with whom they have been so unfortunate as to have dealings, have been guilty of misconduct. We think the court below erred in rendering its decree against appellants, and that as to each of said appellants the decree must be reversed.

We are also unable to see how the court below could obtain jurisdiction to collect these policies in equity, under the cross-

Dunton v. Chamberlain.

bill of the Travelers Insurance Company. By the clause inserted in the policies in which that company was interested, Julius White was made a usee to the extent of the incumbrance of his deed of trust. To that extent he had a right to control the proceeds, when collected, but we think the collection should have been made through the instrumentality of suits at law. The proper practice would have been to compel the assignment and delivery of all of these policies to the receiver, and allow him to proceed at law to enforce their collection. In this way, if these companies had any defenses, such defenses could be properly presented, and adjudicated. The proceeds when collected could be distributed by the court of chancery, according to the equities of the parties.

The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JAMES DUNTON

V.

SIMON E. CHAMBERLAIN.

1	361
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1. STATEMENT—SUBSCRIPTIONS IN AID OF PUBLIC ENTERPRISE.—Appellant, with others, was appointed a committee to solicit aid towards the erection of a foundry building, which building when erected was to be donated to S. & Co., as an inducement to remove their foundry business to the village where appellant resided. In the prosecution of the purposes for which said committee was appointed, appellant called upon appellee, who was an architect, to solicit aid from him, at the same time telling appellee the purpose contemplated, and that whatever was done by the citizens of the village, was to be a voluntary contribution. Under these circumstances, and without any express promise from appellant to pay him therefor, appellee prepared plans and specifications for the proposed building.

2. EXPRESS PROMISE MUST BE PROVED.—*Held*, that under the circumstances, in order to charge appellant with liability for preparing such plans, the fact of an express promise to pay for such plans should be established by a fair preponderance of testimony; and such promise should be proved to have been made before the time the service was rendered; for if the work was not done on the credit of appellant, but for some other person, any subsequent express parol promise to pay for the same would be void, as being a promise to pay the debt of a third person.

Dunton v. Chamberlain.

APPEAL from the Superior Court of Cook county; the Hon. Joseph E. GARY, Judge, presiding.

Mr. CHARLES H. WOOD, for appellant; that an agent does not render himself personally liable where he discloses his agency, unless he assumes personally to bind himself, cited *Wheeler v. Reed*, 36 Ill., 81; *Chicago & Great Eastern R. R. Co. v. Fox*, 41 Ill., 106.

Mr. R. C. HALL, for appellee.

MURPHY, P. J. It appears that in the spring of 1875, the citizens of the suburban town of Arlington Heights, Cook county, and State of Illinois, in the general interest of the property owners of such town, opened negotiations with Messrs. Sigwalt, Peck & Co., manufacturers, to induce them to remove their business to Arlington Heights with the object and purpose, it is presumed, to add to the general prosperity of the town, and thus favorably affect the value of the real estate thereof. With this object in view, there was a committee of the citizens raised to solicit donations and assistance for the purpose of erecting a foundry building, to be donated and given to Sigwalt, Peck & Co. as a consideration or inducement for them to remove their said manufacturing establishment as above stated.

It appears that appellant was a resident of said town, and a member of said committee; that appellee was also a real estate owner there, and was an architect by occupation.

That in the spring of 1875 the appellant, together with some other members of the committee, called on appellee, made known to him their business, and solicited some aid from him; informed him all about the enterprise, and proposed to him that as he had some interest in said town, he should get up plans for the building—they fully explaining to him that it was all a donation, and that if he got it up there was no money in it.

It clearly appears that appellant fully disclosed to appellee at said time that he was not acting for himself in the premises, but as a member of said committee, and was acting on behalf

Dunton v. Chamberlain.

of the citizens by whom they had been appointed. Under these circumstances, and without any express promise on the part of appellant to pay for them, appellee prepared plans and specifications for such foundry building, and to recover pay for such service this suit was brought in the Superior Court of Cook county, a trial of which resulted in a judgment against appellant, who prayed an appeal to this Court, and asks a reversal of said judgment for the reason, amongst others, that the verdict and judgment are not warranted by the evidence.

This point we think well taken. Under the circumstances above stated we think to charge the appellant with liability for preparing said plans the fact of an express promise on his part to pay for such plans should be established by a fair preponderance of the evidence; and that, too, at or before the time said service was rendered by appellee. For if the work was not in fact done on the credit of appellant, but for some other person, then any subsequent express promise to pay for such plans would, by a familiar rule of law, be void, as the promise to pay the debt of a third person. The testimony of the appellee tends to show such express promise or agreement on the part of appellant to pay for said plans, while it is emphatically contradicted in all of its material points by the testimony of the appellant. Treating these two witnesses as entitled to the same credit, they neutralize each other's testimony.

In that case the evidence fails to sustain the verdict. It is a verdict which strikes the mind at first blush, upon an examination of all the evidence, as being contrary to the manifest preponderance thereof.

We forbear any further discussion of the evidence, as such a course would be calculated to influence a jury on a second trial of the case.

We think a motion for a new trial ought to have been sustained, and that it was error for the court to refuse it; for which error the judgment of the Court below is reversed and the cause remanded.

Judgment reversed.

Pennsylvania Co. v. Sloan.

THE PENNSYLVANIA COMPANY

V.

GEORGE M. SLOAN.*

1. FOREIGN CORPORATIONS—JURISDICTION OVER IN THIS STATE—“RESIDENCE.”—Jurisdiction attaches by act of the party and not by virtue of a State law, which has no other force than to authorize such act; and a corporation organized in one State, may by comity or consent, lawfully remove its officers, agents and effects into another sovereignty, and there exercise its corporate functions and franchises. When it has done so, its “residence” for the purposes of jurisdiction, is where its business is done in the latter State.

2. SERVICE UPON—STATUTE OF LIMITATIONS.—The statute provides how service of process may be had upon foreign corporations operating within this State. The ability to obtain such service is the test of the running of the statute of limitations; and where it appears that such corporation had been continuously doing business by its agents in this State for more than two years prior to the commencement of this action, and hence had been subject to the jurisdiction of the courts of this State for such period, the action was barred by the statute.

3. SERVICE UPON A COMMON AGENT OF TWO CORPORATIONS.—The issuance of a summons against one corporation, is not the commencement of a suit against another distinct corporation, though served upon a person who was the common agent of both.

APPEAL from the Circuit Court of Cook county; the Hon. W. K. McALLISTER, Judge, presiding.

Mr. F. H. WINSTON and Mr. GEO. WILLARD, for appellant; on petition for a re-hearing, argued that it is the duty of the Appellate Court to see that the verdict is a fair, legitimate conclusion, logically drawn from all the evidence in the case, and cited in support, Booth v. Hynes, 54 Ill. 363.

Upon the question of negligence on the part of the railroad company, and the care required of persons crossing a railroad track; Ill. Cen. R. R. Co. v. Buckner, 28 Ill. 299; C. R. I. & P. R. R. Co. v. McKean, 40 Ill. 218; C. & A. R. R. Co. v. Gretzner, 46 Ill. 74; T. P. & W. R. R. Co. v. Riley, 47 Ill. 514;

* This case was originally decided at the October term, 1877, and on petition of appellant, a rehearing was granted, and the cause heard at the April term, 1878, when the following opinion was rendered.

Pennsylvania Co. v. Sloan.

C. & N. W. R'y Co. v. Sweeney, 52 Ill. 325; C. R. I. & P. R. Co. v. Austin, 69 Ill. 426; C. & A. R. R. Co. v. Becker, 76 Ill. 25.

That the residence of a corporation is where its business is done: Rev. Stat. 1874, Chap. 83, §§ 1, 14, 18; Rev. Stat. 1874, Chap. 32, § 26; Rev. Stat. 1874, Chap. 114, § 76; Rev. Stat. 1874, Chap. 110, § 2; Mineral Point R. R. Co. v. Keep, 22 Ill. 9; Bristol v. C. & Aurora R. R. Co. 15 Ill. 436; C. D. & V. R. R. Co. v. Bank of North America, 9 Chicago Legal News, 206; B. & M. O. R. R. Co. v. Richardson, 8 Iowa 260; Leroy v. City of Springfield, 81 Ill. 114; Lawrence v. Ballou, 50 Cal. 258.

That by comity between states, corporations can do business and exercise their franchises in foreign states: Ducat v. City of Chicago, 48 Ill. 172; Carroll v. City of St. Louis, 67 Ill. 568; Insurance Co. v. Morse, 20 Wall. 445; Rev. Stat. Chap. 32 § 26.

As to rights and liabilities of foreign corporations in this State: The President etc. v. Montgomery, 2 Scam. 422; O. & M. R. R. Co. v. McClelland, 25 Ill. 142; Ryan v. Dunlap, 17 Ill. 40.

That the court acquires jurisdiction over a corporation by service upon its agent, and a judgment upon such service is valid in courts of other states: Peoria Ins. Co. v. Warner, 28 Ill. 429; LaFayette Ins. Co. v. French, et. al. 18 How. 404; Stephenson Ins. Co. v. Dunn, 45 Ill. 211; Gillespie v. C. M. Ins. Co., 12 Gray, 201.

That the opportunity of serving process is the test of the running of the Statute of Limitations: Chenot v. LeFevre, 3 Gilm. 637; Vallandigham v. Huston, 4 Gilm. 125; Tioga R. R. Co. v. B. & C. R. R. Co. 20 Wall. 137; Beesley v. Spenser, 25 Ill. 261.

That corporations are not excepted from the provisions of the Statute of Limitations: Rev. Stat. 1874, 1011, § 1.

That the subject matter of a suit cannot be changed so as to introduce a new cause of action and thereby avoid the statute: Ill. Cen. R. R. Co. v. Cobb et al. 64 Ill. 147; Connett v. City of Chicago, 8 Chicago Legal News, 323.

Mr. JOHN LYLE KING, for appellee; as to the Statute of Lim-

Pennsylvania Co. v. Sloan.

itations, cited *Hyman v. Bayne*, 83 Ill. 256; *Chonoquin v. Mason*, 1 Gall. 342; *Field v. Dickenson*, 3 Ark. 409; *Hernat v. Porter*, 11 Met. 210; *Ruggles v. Keller*, 3 Johns. 263.

That a judgment obtained by service of process upon the agent of a foreign corporation can have no extra territorial force: *Freeman on Judgments*, § 568; *Hurlburt v. Hope M. L. Ins. Co.*, 4 How. Pr. 275; *Brewster v. Mich. Cen. R. R. Co.* 5 How. Pr. 183; *Bates v. N. O. & J. P. R. R. Co.* 13 How. Pr.; *Latimer v. U. P. R. R. Co.*, 43 Mo. 105.

As to duty of railroads to prevent accidents at crossings, and as to flagmen and persons acting on their signals: *Whart. on Neg.* 387; *Lunt v. R. R. L. R.* 1 Law R. 387; *Chaffee v. R. R.* 104 Mass. 108; *Wheelock v. R. R.* 105 Mass. 203; *Warren v. Fitchburg R. R. Co.* 8 Allen, 227; *Sweeny v. Old Colony R. R.* 10 Allen, 368.

That a corporation, in contemplation of law, must dwell in the place of its organization: *Bank of Augusta v. Earl*. 13 Pet. 538; *Paul v. Virginia*, 8 Wall. 181; *Ducat v. City of Chicago*, 10 Wall. 400; *Lafayette Ins. Co. v. French*, 18 How. 404; *Pomeroy v. N. Y. & Hud. R. R. R. Co.* 4 Blatch. 120; *Angell & Ames on Cor.* §§ 104, 161, 162; *Miller v. Dows*, 4 Otto, 444; *Olcott v. Tioga R. R. Co.* 20 N. Y. 210; *Blossburg R. R. Co. v. Tioga R. R. Co.* 5 Blatch. 387; *Rathburn v. Nor. Cen. R. R. Co.* 50 N. Y. 656; *Robinson v. Imp. Silver Mining Co.* 5 Nev. 45; *Nor. Mo. R. R. Co. v. Akin*, 4 Kan. 453; *Mallery v. Tioga R. R. Co.* 3 Abb. App. 139; *Tioga R. R. Co. v. Blossburg & Corning R. R. Co.* 20 Wall. 137; *Sangamon & Morgan R. R. Co. v. County of Morgan*, 11 Ill. 163.

By express or implied consent of the corporation, it might place itself amenable to the jurisdiction of states other than that of its creation, but without such consent a corporation stands on the same footing as a natural person: *Southern & Atlantic Tel. Co. v. New Orleans, M. & T. R. R. Co.* 2 Cent. L. J. 88; *Stillwell et al. v. Empire Fire Ins. Co.* 4 Cent. L. J. 463; 5 Cent. L. J. 378.

Upon the question of amendment of process: *Teutonia Life Ins. Co. v. Muller*, 77 Ill. 22; *Scheel v. Eidman*, 77 Ill. 301; *Pond v. Ennis*, 69 Ill. 341; *Sherman v. The Propr's Com.*

Pennsylvania Co. v. Sloan.

Bridge Co. 11 Mass. 338; New Albany & Salem R. R. Co. v. Laiman, 8 Ind. 212; Hoyt v. Maxim Gas Co. 8 Alb. L. J. 249; The Kimball & Austin Mf'g Co. v. Vroman, 16 Am. L. Reg. (N. S.) 600; Inman v. Allport, 65 Ill. 540; Dana v. McClure, 39 Vt. 197; Rev. Stat. 1874, Chap. 7, § 1; Rev. Stat. 1874, Chap. 110, § 24.

PLEASANTS, J. Appellee sued out a summons in case against the Pittsburg, Fort Wayne & Chicago R. R. Co., on the 3d day of July, 1874, which was served upon R. C. Meldrum as its general agent, and filed his declaration on the 10th day of August following. The defendant pleaded the general issue, and two trials were had thereon, resulting respectively in verdicts for the plaintiff, which were set aside. During the progress of the third—on the 27th of March, 1877—he obtained leave of court to amend the record and papers by substituting the appellant here as party defendant, and to issue a summons against it; and thereupon a juror was withdrawn and an order of continuance entered. On the same day he amended his declaration, and took out his writ against appellant returnable to the April term, 1877, which was also served upon the said Meldrum, who in fact was, and from the time of service of the first summons had been, the agent of both companies. This defendant plead the general issue, and also the statute of limitations, viz: that the cause of action did not accrue within two years next before the institution of the suit; to which plaintiff replied, first, that the cause of action did accrue within two years; and fourth, that the defendant was a body corporate created by and existing under the laws of the State of Pennsylvania and not of this State, and at the time the several causes of action accrued was, and ever since, until the commencement of this suit, remained and still is out of the State of Illinois.

A demurrer to the latter replication having been overruled, the defendant rejoined to it, first, that on the first day of July, 1869, by leave of the authorities of said state, it came into the county of Cook and commenced the operation of a certain railway line, to wit: The Pittsburg, Fort Wayne & Chicago Railway line, and has since continually, during two years and

Pennsylvania Co. v. Sloan.

upwards since the happening of the alleged injuries, and before the commencement of the suit, operated said line, and during all the time of such operation had and maintained in said county goods, property and effects, and for the conduct of said business continually, etc., by and with the authority of said state, had and kept certain persons who respectively were then and there its officers, agents, attorneys, superintendents, engineers, conductors, station agents, cashiers and clerks, upon whom or either of whom process could have been served at any time during, etc., so as to subject said defendant personally and in its corporate capacity to the jurisdiction of the court; and, second, that during, etc., it had resided in said county and state, and had property and effects therein located and subject to attachment, levy and sale, and in which county said defendant could have been summoned to appear in its corporate capacity before said court and answer to the plaintiff.

To these rejoinders a demurrer was interposed and overruled, and the plaintiff elected to abide by it.

The trial proceeded upon the issues so joined, and the Circuit Court, of its own motion, gave to the jury the following instruction: "If the jury find, from the evidence, that the injury occurred within two years prior to the issuance of the original summons in this case, and that at the time of the service of the summons the said R. C. Meldrum, mentioned in the sheriff's return, was in fact the general agent of the present defendant, and has so continued from that time to the present, then the issuance of said original summons may be regarded as the commencement of this present suit;" and refused to give the following asked by the defendant: "If the jury believe, from the evidence, that the injury in question occurred more than two years next prior to the 27th day of March, A. D. 1877, the time of the commencement of this suit against this defendant, then the jury should find for the defendant."

A verdict was returned in favor of the plaintiff for three thousand dollars, a motion for a new trial was overruled, and a judgment entered on the verdict for the plaintiff, from which the defendant appealed.

At the last term we held that the Circuit Court erred in

Pennsylvania Co. v. Sloan.

overruling the demurrer to the rejoinder; that a foreign corporation must necessarily be and remain "out of this State," and that therefore the Statute of Limitations could not run in its favor. And further, that the court also erred in giving the instruction above recited; that the two corporations named were separate and different parties; that the issuance of a summons against one could not be the institution of a suit against the other, though served upon their common agent; and that the action was not commenced against the appellant until March 27, 1877. But these rulings could have affected only the issue upon the Statute of Limitations, which we deemed immaterial; and inasmuch as we thought the finding upon the general issue was supported by the evidence, which was fairly submitted to the jury upon proper instructions relating to it, we were not disposed to disturb the verdict, and affirmed the judgment.

Upon further investigation and consideration, on the rehearing of the case, we still think the instruction so given was erroneous; but in the light of several decisions since rendered, both in the Federal and state courts, are of opinion that the demurrer to the rejoinders was rightly overruled; that the fact that defendant was a corporation created by and existing under the laws of Pennsylvania was not necessarily conclusive against its right here to the protection of the Statute of Limitations; that the issue upon the statute was therefore material; that its determination under the evidence depended wholly upon the time when this action was commenced; that upon this point the instruction in question was directly misleading; and that the finding upon this issue, and consequently the judgment, should have been for the defendant.

It is provided by our statute that "if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the time herein limited after his coming into or return to this state." R. S. 1874, 675, § 18.

Was the Pennsylvania company, by reason of its origin and nature, necessarily out of this state, and incapable of coming into it?

It is beyond question that a corporation is the creature of

Pennsylvania Co. v. Sloan. .

positive law, and where that law ceases to operate can have no existence. Such is the familiar doctrine announced in *The Bank of Augusta v. Earl*, 13 Peters, 519, and often since approved. The courts of New York, and of Nevada following them, have applied it specifically to the exclusion of foreign corporations from the benefit of their Statutes of Limitation, under a provision substantially like that of our own above quoted: *Olcott v. The Tioga R. R. Co.* 20 N. Y. 210; *Rathbun v. The Northern Central R'y Co.* 50 Id. 656; *Robinson v. The Imperial Silver Mining Co.* 5 Nev 44; *State of Nevada, v. The Central Pacific R. R. Co.* 10 Id. 47; *Barstow v. The Union Consolidated Silver Mining Co.* Id, 386. And several of the circuit courts of the U. S. have declined to take jurisdiction of them, as not being "inhabitants of or found in" the district: *Day v. The Goodyear Rubber Co.* 1 Blatch. 628; *Pomeroy v. The N. Y. & N. Haven R. R. Co.* 4 Id. 120; *Blossburg & Corning R. R. Co. v. The Tioga R. R. Co.* 5 Id. 387; *The Southern & Atlantic Telegraph Co. v. The New Orleans, Mobile & Texas R. R. Co.* 2 Cent. Law J. 88; *Stilwell v. The Empire Fire Ins. Co.* 4 Id. 463, and note.

We should have no hesitation in approving of these applications of the doctrine if there were no other element in the cases bearing on the question than the origin and nature of the corporation. For it is true that a positive law can never, of its own force, and ordinarily does not otherwise operate beyond the territorial limits of the power by which it is enacted; and hence, unless otherwise enabled, a corporation must indeed "dwell in the place of its creation, and cannot migrate into another sovereignty." But the law of one State may have operation for certain purposes in another, by the comity or permission of the latter; and we see no insuperable difficulty in the way of such migration, provided the former does not positively forbid and the latter does positively consent.

It is conceded, even by the decisions above referred to, that with such consent they lawfully may, as they often actually do, remove their officers, agents, offices and effects into another sovereignty, and there exercise their functions and franchises. See, also, *Ducat v. The City of Chicago*, 48 Ill. 172; *The La-*

Pennsylvania Co. v. Sloan.

fayette Ins. Co. v. French, 18 How. 404; Balto. & Ohio R. R. Co. v. Harris, 12 Wall. 65; The Railway Co. v. Whitton's Adm. 13 Wall. 284; Gillespie v. The Commercial Mut. Mar. Ins. Co. 12 Gray, 201. In such a case, where is the corporation? If it be said that it still dwells in the place of its creation, and is acting elsewhere only by agents, the answer is, no more by agents elsewhere than in the place of its creation. It can do nothing anywhere, nor manifest its presence or being at all, except through its agents, its property or its operation. Where these are, then, it seems most accordant with substantial fact and reason to say, there is the corporation. Where these are not, we know of no means by which process can be served upon it; and if there be none, that fact would seem to be conclusive upon the question of residence for the time being, at least for purposes of judicial jurisdiction.

Accordingly our own Supreme Court held the "residence" to be "where its business was done"—"where it exercises corporate franchises:" *Bristol v. The Chicago & Aurora R'y Co.* 15 Ill. 436. Although this was said of a domestic corporation, it was upon a question of local jurisdiction by counties; and in a very late case, against their first impression, but upon rehearing, and after more full and mature consideration, they held it applicable to a foreign one as well: *Bank of North America v. The Chicago, Danville & Vincennes R. R. Co.* 82 Ill. 493.

This authority alone would suffice for us, but it is supported by late decisions of the courts of other states: *Lawrence v. Ballou*, 50 Cal. 258; *Baldwin v. The M. & M. R. R. Co.* 5 Iowa, 518; *Richardson v. The Burlington & Mo. R. R. Co.* 8 Id. 260; *The North Mo. R. R. Co. v. Akers*, 4 Kan. 453.

So of the Federal courts. Judge DILLON, in the case above cited from 4 Cent. Law J., regarded the proposition as reasonable and just, and said that if he were not foreclosed by other decisions—referring doubtless to those of Mr. Justice NELSON, in *Blatchford*—he would be strongly inclined to hold that a corporation created by the law of one State and doing business by permission in another, although a citizen of the former, was an "inhabitant" of the latter for purposes of jurisdiction. He is no longer so foreclosed.

Pennsylvania Co. v. Sloan.

Mr. Justice NELSON himself said, in *Pomeroy v. The N. Y. & N. H. R. R. Co. supra*, that in such a case he should have no difficulty in sustaining the jurisdiction of the State courts over the foreign corporation. But his decision was that it depended upon the State law giving the permission, and that a State law could not confer jurisdiction upon a Federal court. It was by this decision that Judge DILLON felt himself bound, and for the same reason assigned in it that Judge HILL also so held in *The S. & A. Telegraph Co. v. The N. O. M. & T. R. R. Co.* 2 Cent. Law J. 88. In other circuits, however, a different view has since been taken, and the jurisdiction of the Federal court asserted: *Knott v. The Southern Life Ins. Co.* 2 Woods, 479, and *Fonda v. The British Am. Life Ins. Co.* 10 Chicago Legal News, 309; and these decisions have now been approved by the Supreme Court of the United States in a very recent case, in which they review and expressly overrule those in *Blatchford*: *Ex parte Schollenberger*, published in "The Reporter" of July 3, 1878. They hold that the jurisdiction attaches upon the act of the party, and not by virtue of the State law, which has no other effect than to authorize that act; that the corporation is thereby found to be in the State, so as to be amenable, like those of its own creation, to the process of the courts established within it. And they say that this was really settled, and the cases in 1st and 4th *Blatchford* overruled, by that of the *Balto. & Ohio R. R. Co. v. Harris*, 12 Wall, 65, in the decision of which Judge NELSON fully concurred.

It thus appears to us that the decided weight of authority elsewhere is in support of that of our own Supreme Court, and to the effect that in this class of cases the foreign corporation is resident where, by proper permission, it carries on its business. In view of the vast extension of the business of these artificial persons, the methods of conducting it, their relations to natural persons growing out of it, and the rights and interests of such persons as so related, we regard this as the more reasonable and consistent theory.

But whether it be correct or not, the jurisdiction of the state over them is fully sustained by these authorities upon

Pennsylvania Co. v. Sloan.

that of their consent, manifested by their engagement in business within it under its permission given upon condition of such consent.

This jurisdiction is efficient. Judgments against them, upon service on their agents or otherwise according to the law of the State, are personal and therefore conclusive in other states. *LaFayette Ins. Co. v. French*, 18 How. 404; *Gillespie v. The Commercial Mut. Mar. Ins. Co.* 12 Gray, 201.

Ability to obtain such service is the test of the running of the Statute of Limitations. Said our Supreme Court: "Under our statute the inability of the creditor to have personal service on his debtor, seems to be made the sole ground for arresting it." *Vallandigham v. Huston*, 4 Gilm. 128. See, also, the opinion of Justices Miller and Strong, in the *Tioga R. R. Co. v. The Blossburg & Corning R. R. Co.* 20 Wall. 137.

It remains only to inquire whether any, and what, and upon what conditions, if any, permission has by this State been given to foreign companies to do business within it.

By § 2 of the Practice Act, it is provided that "actions against a railroad company may be brought in the county where its principal office is located, or in the county where the cause of action accrued, or in any county into or through which its road may run." R. S. 1874, 775.

By § 5 of the same, that "an incorporated company may be served with process by leaving a copy thereof with its president if he can be found in the county; if he shall not be found in the county, then by leaving a copy with 'any of the officers or agents therein mentioned'—including any 'general agent'—'or any agent of said company found in said county.'" *Ibid.*

And by § 26 of the "Act concerning corporations," approved April 18, 1872, in force July 1, 1872, that "Foreign corporations and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers:" *Id.* 290 § 26.

These provisions are all applicable and have been in force

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

since a time anterior to the happening of the injuries complained of in this case.

The evidence shows, and it is undisputed, that since 1869 the appellant, fully equipped as to means and men, has been operating a line of railway in the county of Cook. During all that time, therefore, it has been subject to the jurisdiction of the Circuit and other courts of said county. The injuries here complained of were received on the 5th day of July, 1872, yet no process was issued in any suit therefor which purported to be against the appellant, until March 27th, 1877. The summons against another corporation as sole defendant, issued July 3, 1874—two days within the period limited by the statute—was not the commencement of this action, and the instruction to the jury, that upon the facts therein stated it might be so regarded, was in our opinion erroneous, and we have no doubt injurious. For that error and the consequent refusal of the instruction asked by the defendant, the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

THE CHICAGO, BURLINGTON & QUINCY R. R. Co. ET AL.

V.

JESSE HOYT ET AL.

1. WAREHOUSES—COMPELLING DELIVERY OF GRAIN.—If the place of consignment can be reached by any track, of which the railroad company is the owner or lessee, or in the lawful use, or which can be lawfully and rightfully used by it, the company is bound to deliver at that place. But this is the extent of the duty imposed by the Constitution. The contrary interpretation would involve the fundamental law in the absurdity of commanding the performance of an unlawful act.

2. DELIVERY OVER TRACK OF ANOTHER COMPANY CANNOT BE COMPELLED.—Where a portion of the track over which the defendant company must run its cars, in order to deliver grain at the warehouse in question, belongs to another company, and no right has been obtained by the defendant, by purchase or otherwise, to use such track for that purpose, it cannot be compelled to make such delivery; nor can it be compelled against

its will, to procure the right so to do. The legal aspect of the case is not changed by the fact that the owner of such connecting side-track has interposed no objection to the use of this track by the defendant company in the past.

3. RIGHT OF WAREHOUSE OWNERS TO CONSTRUCT CONNECTING SIDE-TRACKS.—Had the owners of the warehouse themselves constructed tracks, side-tracks, etc., in and about their warehouse, suitable for the economical and convenient delivery of grain to said warehouse, and extended the same to the track of the defendant railroad company, and asked to be allowed to form a junction with that track, a very different class of questions would have been presented.

4. RIGHT OF A MAJORITY OF CO-PROPRIETORS TO CONTROL THE BUSINESS.—Whatever may, ordinarily, be the power of a majority in interest over the business of a public warehouse, their right to exercise such control, in utter disregard of the rights and wishes of the minority, cannot be conceded; and under the facts in this case, the majority have not entitled themselves, as against the rights of the minority, to the relief prayed for in the supplemental bill.

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

Messrs. GOUDY, CHANDLER & SKINNER, for appellants; argued that complainants were not entitled to the relief sought because their elevator cannot be reached by any track owned by the defendant railroad company, and cited *Vincent v. C. & A. R. R. Co.* 49 Ill. 33; *The People ex rel. Hempstead v. C. & A. R. R. Co.* 55 Ill. 95; *C. & N. W. R'y Co. v. The People*, 56 Ill. 365; *Rouse v. Home of the Friendless*, 8 Wall. 430; *Rouse v. Washington Union*, 8 Wall. 439.

Upon the question of legislative control over private property: *Munn v. Illinois*, 4 Otto, 123.

That a mandatory decree ought not to have been entered against the railroad company: *Lane v. Newdigate*, 10 Ves. 192; *Irenberg v. East India Co.* 33 L. J. Chy. 392.

Messrs. WILLIAMS & THOMPSON, for appellants; that delivery to warehouses not on the line of the company's track cannot be compelled, cited *People ex rel. v. C. & A. R. R. Co.* 55 Ill. 95; *Vincent v. C. & A. R. R. Co.* 49 Ill. 33; *Spruance v. C. & N. W. R'y Co.* 57 Ill. 436; *Bridge Co. v. The*

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

State, 18 Conn. 64; Commonwealth v. Essex Co. 13 Gray, 239; Commonwealth v. Bridge Co. 2 Gray, 339.

Upon the right of the railroad company to remove its side-track and connections: Jackson v. Railroad Company, 11 Am. L. Reg. 378; Heyl v. P. W. & B. R. R. 51 Pa. St. 469; Woodward v. Seeley, 11 Ill. 157.

That complainants, not being sole owners of the warehouse, are not entitled to the exclusive management of it: Freeman on Co-tenancy, § 331; Johnson v. Sepulbeda, 5 Cal. 149; Livingston v. Lynch, 4 Johns. Ch. 573; Green v. Miller, 6 John. 39; Davis v. Hawkins, 3 M. & S. 488; Parsons on Partnership 221; Steamboat Orleans v. Phœbus, 11 Pet. 175; Glassington v. Thwaites, 1 Sim. & S. 124; Const. v. Harris, Turn. & R. 496.

That the purpose contemplated by complainants was in effect a secret combination or contract to control the price of grain, cost of storage etc., and the same was fraudulent and void: Croft v. McConoughy, 79 Ill. 346; Fairbank v. Leary, 40 Wis. 637; Morris Run Co. v. Barclay, Co. 68 Pa. St. 173; Hooker v. Vandewater, 4 Denio, 369; Stanton v. Allen, 5 Denio, 434; Hilton v. Eckersly, 6 E. & B. 47; Brooks v. Martin, 2 Wall. 75.

That no suit can be maintained by a part only of those engaged in some common undertaking, when the remaining owners decline to join in such suit, unless the suit is necessary for the protection of the common property; and generally as to the rights and remedies of tenants in common: Hall v. Hall, 3 Mc. N. & G. 79; Waters v. Taylor, 15 Ves. 10; Roberts v. Eberhardt, Kay, 148; Miles v. Thomas, 9 Sim. 606; Peacock v. Peacock, 16 Ves. 57; Cooper v. Cedar Rapids Water Power Co. 42 Iowa 398; Hanson v. Willard, 12 Me. 142; Smith v. Smith, 10 Paige 470; Hale v. Thomas, 7 Ves. 589; Thwort v. Thwort, 16 Ves. 128; Goodman v. Spray, 2 Dick. 667; Smallman v. Onions, 3 Bro. C. C. 621; Hawley v. Clows, 2 Johns. Ch. 122; Obert v. Obert, 5 N. J. Ch. 397; Crest v. Jack, 3 Watts. 238; Thurston v. Dickinson, 2 Rich. 317; Chambers v. Jones, 72 Ill. 275; Baldwin v. Parker, 99 Mass. 74; Gardner v. Deidrichs, 41 Ill. 198; Adams v. Briggs, Iron Co. 7 Cush. 361; Bennett v. Clements, 6 Allen, 10; Washburn on Easements and Servitudes, 37.

That the complainants are shown to have been guilty of fraud upon their associates in the matter of rebuilding the elevator, and coming into court with unclean hands are not entitled to relief: Story's Eq. Juris. § 298; Roberts v. Roberts, 3 P. Wms. 74; Croft v. McConoughy, 79 Ill. 346; Cassady v. Cavenor, 37 Iowa, 300; Carter v. Winslow, 38 Vt. 691; Fetridge v. Wells, 13 How. Pr. 385.

That complainants at the time of bringing the suit had not obtained a license to transact business, as required by law: Laws of 1871, Act relating to warehouses, § 3; Munn v. The People, 69 Ill. 80; Munn v. The People, 94 U. S. 113.

That this defect is not cured by obtaining a license before filing a supplemental bill: Story's Eq. Pl. § 336; Candler v. Pettit, 1 Paige 168; Fry v. Quinlan, 13 Blatch. 205.

That a mandamus will not be issued to compel the performance of an act which the court has not complete authority to require to be done: *Ex parte Paine*, 1 Hill, 666; *Ex parte Clapper*, Hill, 548.

That the injunction awarded by the court below is mandatory, and ought not to have been granted: Baxter v. Board of Trade, 83 Ill. 146; Fisher v. Board of Trade, 80 Ill. 86; Menard v. Hood, 68 Ill. 121; Wangelin v. Goe. 50 Ill. 459; 2 Green's Chy. N. J. 141.

Mr. MELVILLE W. FULLER for appellees: contending that the defendant company is bound to deliver over the track in question, because it is part of its lines, in view of the circumstances under which it was laid, cited C. & N. W. R'y Co. v. The People, 56 Ill. 365; Vincent v. C. & A. R. R. Co., 49 Ill. 33; Munn et al. v. The People, 94 U. S. 113; Munn v. The People, 69 Ill. 80; C. & A. R. R. Co. v. The People, 67 Ill. 11; C. B. & Q. R. R. Co. v. The People, 77 Ill. 443; People v. C. B. & Q. R. R. Co., 94 U. S. 155; Olcott v. Supervisors, 16 Wall, 695; People v. C. & N. W. R'y Co., 57 Ill. 436; Constitution Art. XI. §§ 82, 85; Rev. Stat. 1874, 815.

That the company cannot remove the side-track: State v. R. R. 29 Conn. 538; Vincent v. C. & A. R. R. Co. 49 Ill. 33.

That the relief awarded was proper: Vincent v. C. & A. R.

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

R. Co. 49 Ill. 33; 20 N. J. Eq. 379; Fry on Spec. Performance, 433; City of Ottawa v. The People, 48 Ill. 233.

That relief cannot be denied because the two co-proprietors refused to join in the bill of complaint: Haven v. Mehlgarten, 19 Ill. 91; Thorndike v. DeWolf, 6 Pick. 120; Peacock v. Cummings, 46 Penn. 434; Mills v. Thomas, 9 Sim. 609; Parsons on Partnership, 228, 316, 578; Livingston v. Lynch, 4 Johns Ch. 573.

The objection that appellees do not come with clean hands, for want of license or otherwise, cannot prevail: Pangborn v. Westlake, 36 Iowa, 546; Lester v. Howard Bank, 33 Md. 558; 18 Mo. 229; Cooley on Const. Lim. 181; Baker v. Braman, 6 Hill. 511; Ferguson v. Landram, 1 Bush, 548; Home Ins. Co. v. Security Ins. Co. 23 Wis. 171; Deming v. The State, 23 Ind. 416; Harris v. Runnells, 12 How. U. S. 79; Story's Eq. Jur. §§ 298, 300; Rev. Stat. 820, §, 100; Act of May 21, 1877, 169.

No adequate excuse is shown for refusal to deliver: C. & N. W. R'y Co. v. The People, 56 Ill. 365; Reg. v. B. R'y Co. 2 Ad. & E. (N. S.) 47; Reg. v. York & U. M. R. 16 Eng. Law & Eq. 299; 42 Eng. C. L. 575; Galena, etc. R. R. Co. v. Rae, 18 Ill. 488.

Upon the question of jurisdiction of the court: Robinson v. Lord Byron, 1 Bro. C. C. 588; Great N. of Eng. R. Co. v. C. R. Co. 1 Coll. 507; Henry v. Smith, 1 K. & J. 392; Att'y Gen. v. Borough of Birm. 4 K. & J. 547; Rogers' L. & M. Works v. Erie R. W. Co. 2 N. J. Eq. 390; Fry on Specific Performance, 433.

BAILEY, J. On the 27th day of November, 1876, appellees exhibited their bill in chancery in the Circuit Court of Cook county, praying for an injunction to restrain the Chicago, Burlington & Quincy Railroad Company from taking up a certain side-track connecting the main track of said company's railroad with a track running into a certain grain warehouse in Chicago, known as the "Union Elevator." The complainants are the owners of an undivided three-fourths of said warehouse, and Armour and Munger, two of the appellants, own the remaining one-fourth; but they, having interest in the subject

matter of the suit, adverse to the complainants, were joined with the Chicago, Burlington and Quincy Railroad Company, as defendants to the bill.

An injunction, *pendente lite*, was granted as prayed for, and afterwards, on the 5th day of April, 1877, the complainants filed a supplemental bill, charging, that said company had refused to deliver at said warehouse certain car loads of grain received by it, consigned thereto, and were refusing to receive for transportation, grain consigned to said warehouse, and praying that said company be commanded to receive grain so consigned, and to deliver the same to said warehouse, and be restrained and enjoined from refusing so to do. Issues were duly formed upon both said original and supplemental bill, by answers and replications, and the cause being heard in the court below, upon the pleadings and evidence, a decree was rendered in favor of the complainants, against said railroad company, in accordance with the prayer of both the original and supplemental bill, from which decree this appeal is prosecuted.

It appears, from the evidence, that the warehouse in question was built in 1861, by Charles M. Smith and Albert Sturgis, in pursuance of a certain agreement between them and the Chicago and Joliet Railroad Company, made on the 26th day August, 1861. By this agreement, Smith and Sturgis undertook to construct, maintain and operate said warehouse, and receive and store therein all grain transported thereto by said company, observing, in so doing, the rules customary with other similar warehouses in Chicago, and exacting a compensation for storage no greater than that charged by other similar warehouses. Said Smith and Sturgis also agreed to furnish to said railroad company, free of cost, the necessary ground adjoining said warehouse, and between the same and said company's railroad, for laying down tracks, side-tracks and turn-outs. Said company, on its part, agreed to lay all necessary tracks, side-tracks and turn-outs to said warehouse, for the use of said railroad and warehouse, in the best practical manner, for the mutual benefit and convenience of the respective parties to said agreement, reserving the right to remove said

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

tracks, in case any of the covenants or agreements on the part of said Smith and Sturgis, should not be fully complied with. Said company further agreed to deliver, or cause to be delivered, to said warehouse, all grain transported over its railroad from all points southward of Chicago, discriminating therein in favor of said Smith and Sturgis, as against other warehousemen in Chicago, provided it could do so legally and without prejudice to its own interest. Upon the construction of said warehouse, the Chicago and Joliet Railroad Company, or its lessee and successor, the Chicago and Alton Railroad Company, laid down two tracks running from the main track of what is now the Chicago and Alton Railroad, into said warehouse, and also constructed in front of and about said warehouse, side-tracks, turn-outs, etc., sufficient for the convenient and economical delivery of grain by it to said warehouse. For several years after its erection, this warehouse was the principal if not the only place in use, for the storage of grain shipped to Chicago over the Chicago and Alton Railroad, but within the past few years, several other similar warehouses have been built on the line of said road, which now compete with it for this business. With the exception only of such grain as has been delivered to it by the Chicago, Burlington and Quincy Railroad Company, the sole business of this warehouse has been the storage of grain shipped over the Chicago and Alton Railroad.

The evidence shows that there are in existence in Chicago, on the line of the Chicago, Burlington and Quincy Railroad, three grain warehouses, known as Burlington elevators "A," "B" and "C," of sufficient capacity to store all grain shipped over that road, and furnished with all tracks, side tracks, turn-outs, etc., necessary for the convenient and economical delivery of grain thereto by that road. In the year 1866, in consequence of the destruction by fire of one of these warehouses, and of unusually large shipments of grain, the Chicago, Burlington and Quincy Railroad Company, to provide for the additional storage required by the emergency, laid a side track running from its own main track, and connecting, about fifteen feet from the entrance to the Union Elevator, with one of

the tracks running into that elevator. So far as appears, no express permission was given by the Alton Company to form this connection, nor does there seem to have been any objection thereto made by said company, or by the owners of the warehouse. By means of the connection thus established, the Chicago, Burlington and Quincy Railroad Company was enabled to reach the Union Elevator, and during the year 1866 about one thousand car loads of grain were delivered thereto by said company. In the year 1868, this side track was removed by said company, thus severing its connection with said warehouse.

Shortly afterwards, Messrs. Munn and Scott, who, at the time, were managers and part owners of the Union Elevator, applied to said company to relay said track so as to enable the Michigan Central Railroad Company to thereby reach said elevator, for the purpose of receiving grain therefrom for transportation to the East, and on their application the track was relaid upon an express agreement or understanding, as is now alleged, that it should be used for no other purpose except for the removal of grain from said warehouse. It does not appear that the track, since being relaid, has been used for any other purpose than for shipping out grain, excepting that in 1873, about two hundred car loads of grain, mostly damaged, were delivered to this elevator by the Chicago, Burlington and Quincy Railroad Company. This delivery was made under very considerable disadvantages, owing to the fact that the doorways to the elevator were so low as not to admit of the entrance of the cars of that company without the removal of the brakes.

It appears that defendants, Armour and Munger, who are joint owners with the complainants in the Union Elevator, are largely interested in the Burlington Elevators, with which the complainants are seeking to bring the Union Elevator into competition. With a view to placing the Union Elevator in direct competition with the Burlington elevators, for the storage of the grain shipped over the Chicago, Burlington and Quincy railroad, the complainants, in the year 1874, caused the Union Elevator to be completely rebuilt, and the doorways enlarged

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

so as to admit the Burlington cars, at an expense of something over \$100,000. Armour and Munger being, as it seems, in ignorance of the purpose for which these repairs were being made, gave their consent thereto, and paid their proportion of the expense incurred. There is no pretense that, up to the time of filing the original bill, any efforts or attempts had been made by the complainants to obtain shipments of grain to their warehouse over the Chicago, Burlington and Quincy railroad, but it is expressly averred that they had refrained from so doing in consequence of the hostility of that company, and a fear that should they attempt to obtain such shipments, the connection between said railroad and their warehouse would be instantly severed by the removal of said side-track. Having obtained their injunction restraining the removal of the track, they seem to have commenced soliciting shipments of grain to their warehouse, and having obtained certain consignments which the company refused to deliver to them, the company at the same time, as is alleged, instructing its agents along its line to receive for shipment no grain consigned to said warehouse, the supplemental bill was filed.

It is insisted that the complainants are not entitled to a decree, because the Union Elevator is not upon the line of road of the Chicago, Burlington and Quincy Railroad Company, and can only be reached by the use of a track belonging to the Chicago and Alton Railroad Company, the use of which, for the purpose, has not been secured.

The President of the Chicago & Alton Railroad Company was examined as a witness, and from his testimony it appears that the tracks leading to, as well as those inside the elevator, were built by his company out of its own materials, and that ever since they were built, said company had had charge of said tracks, and kept the same in repair.

He says the Chicago and Alton Railroad Company had never, to his knowledge, given any license to the Chicago, Burlington and Quincy Railroad Company to run its cars over said track, nor had it, to his knowledge, interposed any specific objection to such use of said tracks, except that on one or more occasions, it had claimed the first right to the use of the

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

warehouse, though it had never claimed an exclusive right thereto. When his company had no occasion to use said tracks, he supposed the owners of the ground had the right to put them to other uses, but when it did use them, it had a right to them in preference to any one else.

Under these circumstances, can it be held that this elevator is on the line of the Chicago, Burlington and Quincy Railroad?

In *Vincent et al. v. The Chicago and Alton R. R. Co.* 49 Ill. 33, it was held that where the owner of property adjacent to a railroad had erected thereon a warehouse which was in readiness for the receipt of freight, and had, with the consent of the railroad company, for a valuable consideration, laid down a side track, connecting the track of the company with such warehouse; such side track was to be considered as a part of the line of the company, for the purposes of delivering freight at such warehouse. In the opinion Lawrence, J. says: "A railway company can, unquestionably, refuse to allow the owner of adjacent property to lay down a side track connecting with its own rails, but when, for a valid consideration, it has conceded that right, and, as in the case before us, has permitted the connection to be made, and the side track to be laid for the use of a particular lot of ground, and in order to transport to such lot heavy articles of freight, and the owner of such lot and side track has his warehouse in readiness for the receipt of such freight, then, we say, that such side track is to be considered as a part of its line for the purposes of delivery under the statute. There is no reason why it should not be so regarded, as much as if the elevator stood upon a side track belonging to the railway itself."

In *The People ex rel. etc. v. The Chicago & Alton R. R. Co.* 55 Ill. 95, the relator applied for a writ of mandamus, to compel a railroad company to receive a quantity of grain at one of its stations, to be transported and delivered to a certain grain elevator in the city of Chicago, situated upon a side-track connected with the defendant's road, but beyond its actual terminus. The side-track was owned and controlled by other companies with whom the defendant had no arrangement for its use,

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

except such as might be specially agreed upon in particular instances, though, under an ordinance of the city the defendant, could have compelled an arrangement for its regular and permanent use. Under such circumstances, it was held that the defendant could not be compelled to receive grain to be delivered at such elevator, beyond the terminus of its own road, and could not be compelled to acquire the right to use the side-track connecting its road with the elevator for the purpose of such delivery, and that the rights of the parties in that regard would not be affected by the fact that the defendant had previously, in repeated instances, delivered freight at the elevator by the use of the side-track running thereto, under special agreements for that purpose; that in order to compel a railroad company to deliver grain shipped on its road at the particular elevator to which it may be consigned, it is indispensable that such elevator should be connected with the company's line of railroad by some track which is in fact a portion of such line, or such as would, under the statute, be regarded for the purposes of such delivery as a portion thereof.

In *The People ex rel. etc. v. C. & N. W. R. W. Co.* 57 Ill. 436, it was held that, by the rules of the common law, railroad companies cannot be compelled to permit individuals to connect side-tracks of their own with the tracks of such companies in order to enable the latter to carry grain to warehouses situated off their lines of road.

The foregoing cases were decided while the act of 1867, in relation to warehouses, was in force. That act made it unlawful for any railroad company to deliver any grain into any warehouse other than that to which it was consigned, without the consent of the owner or consignee thereof, and punished by suitable penalties a failure by the railroad company to make a delivery according to the direction of the owner or consignee.

Under these decisions, however, it is clear that notwithstanding the mandate of this statute, a railroad company could not be compelled to deliver grain to any warehouse not actually on the line of its road, or on some track connected therewith under such circumstances that, for the purposes of such delivery it would be deemed, in law, a portion of its line. Manifestly

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

under the doctrine of these cases, the Chicago, Burlington and Quincy Railroad Company could not be compelled to receive or deliver grain consigned to the Union Elevator.

It is claimed, however, by appellees, that the rules of law applicable to this subject have been changed by Sec. 5, Art. 13, of the Constitution of 1870, and the laws passed in pursuance thereof. The section of the Constitution referred to is as follows:

“All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee, or the elevator or public warehouse, can be reached by any track owned, leased or used, or which can be used by such railroad companies; and all railroad companies shall permit connections to be made with their track, so that any such consignee, and any public warehouse, coal bank or coal yard, may be reached by the cars on said railroad.”

Section 1 of the act of April 25th, 1871, passed in pursuance of Article 13 of the Constitution, requires all railroad companies to receive and transport grain in bulk, and to load the same, either upon its track at its depot, or in any warehouse adjoining its track or side track, without distinction, discrimination or favor between one citizen and another, and without distinction or discrimination as to the manner in which such grain is offered for transportation, or as to the person, warehouse or place to whom or to which it may be consigned. Section 3 of said act is as follows :

“Every railroad corporation which shall receive any grain in bulk for transportation to any place within the State, shall transport and deliver the same to any consignee, elevator, warehouse or place to whom or to which it may be consigned or directed. *Provided*, such person, warehouse or place can be reached by any track owned, leased or used, or which can be used by such corporation; and every such corporation shall permit connections to be made and maintained with its track, to and from any and all public warehouses where grain is, or may be stored.” R. S. 1874, 815.

How far have these provisions of the Constitution and

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

statutes modified the rules of law applicable to this subject! We are aware of no decision of this question by the Supreme Court, and are, therefore, compelled to consider it unaided by the light of any authority. It is an indisputable fact that the track of the Chicago & Alton Railroad Company, leading into the Union Elevator, and with which the side-track of the Chicago, Burlington and Quincy Railroad connects, *was used* by the latter company in 1868, and again in 1873; and it is further true, that it is *physically possible* for said company to still use it for the transportation and delivery of grain into said warehouse. Does the Constitution, however, by the words "can be used," contemplate a mere physical possibility, or does it, with such physical possibility include the legal possibility or right to use such track? If the construction be insisted upon, that this mandate of the Constitution was designed to require railroad companies to use all tracks connected in a physical sense, merely, with their line of road, for the purpose of transporting grain to the place of consignment, it may well be doubted whether that instrument would not be obnoxious to the charge of impairing the obligation of existing contracts, so as to be itself within the prohibition of the Federal Constitution. An imposition of the duty to use the tracks of other companies, which of necessity would involve the further duty of acquiring by purchase or otherwise the right so to do, might well be held to be such an invasion of the franchises granted to these companies by their charters, and the rights and immunities guaranteed to them by their contract with the State, as to be beyond the legal competency of the people in the formation of their organic law.

But we are unable to adopt the construction here suggested. We cannot suppose it to be the intention of the Constitution to abridge the rights and immunities vested in these corporations by their charters, or to impose upon them the duty of performing any act which they have no legal right to perform. To the extent of their legal rights and powers, the mandate of the Constitution is doubtless operative. If the place of consignment can be reached by any track of which the railroad company is the owner or lessee, or in the lawful

use, or which can be lawfully and rightfully used by it, the company is bound to deliver at that place. This, however, we think, is the extent of the duty imposed by the Constitution. The contrary interpretation would involve the fundamental law in the absurdity of commanding the performance of an unlawful act.

So long as a portion of the track over which the defendant company must run its cars in order to deliver grain at the warehouse in question, belongs to another company, and no right has been obtained, by purchase or otherwise, to use such track for that purpose, it cannot be compelled to make such delivery. Nor can it be compelled against its will to procure the right so to do. We cannot perceive that the legal aspects of the case are changed in the least by the fact that the Chicago and Alton company has interposed no objection to the use of this track by the Burlington company in the past, and may reasonably be expected to acquiesce in such use in the future. Such acquiescence would be a matter of grace and not of legal duty, and might at any instant be withdrawn. The courts will not lend their aid to decree the performance of acts so long as the right to perform depends upon the pleasure or caprice of parties not before the court, who, by the withdrawal of their acquiescence or permission, may, at any time, render the performance impossible, and the judgment of the court nugatory.

It should be observed that the Chicago and Alton Railroad Company is not a party to this suit, and is not bound by the decree. What relief might have been granted had that company also been brought before the court and a decree sought against the present defendant, requiring it to deliver to the Alton Company grain consigned to the Union Elevator, and against the Alton Company, requiring it to receive such grain, and deliver it to said warehouse, we do not decide.

It would seem that the last clause of the section of the Constitution above cited, requiring all railroad companies to permit connections to be made with their track, so that any public warehouse may be reached by the cars on such railroads, changes the rule laid down in *Vincent et al. v. The C. & A. R. R. Co.* and *The People ex rel. etc. v. C. & N. W. R. W. Co. supra*, in so

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

far as those cases hold that a railroad company cannot be compelled to permit individuals to connect side tracks of their own with the tracks of such companies, in order to enable the latter to carry grain to warehouses situated off their lines of road. Had the appellees themselves constructed tracks, side tracks, etc. in and about their warehouse, suitable for the economical and convenient delivery of grain to said warehouse, and extended the same to the track of the Chicago, Burlington and Quincy Railroad, and asked to be allowed to form a junction with that track, a very different class of questions would have been presented.

It is further insisted by the appellants that the decree should be reversed, because at the time the defendant company is alleged in their supplemental bill to have refused to deliver grain to their warehouse, they had not obtained a license to transact the business of public warehousemen, or filed their bond as required by law.

The warehouse in question belonged to the class of public warehouses designated by the warehouse act of April 25th, 1871, as class "A." Said warehouse act provides that "the proprietor, lessee or manager of any public warehouse of class A, shall be required *before transacting any business* in such warehouse, to procure from the Circuit Court of the county in which such warehouse is situated, a license permitting such proprietor, lessee or manager to transact business as a public warehouseman, under the laws of this State."

The act further provides for the execution, by the person receiving such license, of a bond conditioned "for the faithful performance of his duty as a public warehouseman of class A, and his full and unreserved compliance with all the laws of this State in relation thereto." R. S. 1874, p. 820.

The evidence shows that appellees procured their license as warehousemen on the 12th day of March, 1877. The supplemental bill, although filed on the 5th day of April, 1877, was signed and sworn to March 3d, 1877, which was prior to the date of said license. Necessarily the acts on the part of the defendant company, complained of in the supplemental bill, were of a date not later than March 3d, and so were anterior to

the date of the license. No grounds of complaint are set up in the pleadings arising after appellees received lawful authority to transact business in their warehouse. At the time of the refusal by the defendant company to deliver grain to said warehouse, or to receive grain consigned thereto, appellees had no authority to transact business as public warehousemen, and the company was justified in refusing to treat with them as such. Appellees must recover, if at all, upon the case made by their bill, and, as no case is there presented showing a refusal by the defendant company to receive grain consigned to their warehouse, or to deliver the same, at any time subsequent to the date of their license, we are unable to see upon what principle they are entitled to any relief under the supplemental bill.

Appellants make the further point, that appellees, being the owners of only an undivided three-fourths interest in the warehouse, cannot as against the owners of the remaining one-fourth interest, control the business of the warehouse, and so cannot maintain their bill for the relief sought in this case.

On the part of appellees it seems to be admitted that in business enterprises which are merely private in their nature and character, a majority of the proprietors have no power to control the minority in the absence of an express contract empowering them so to do. But it is contended that the rule is different with enterprises of a public or *quasi* public character, and that the business of maintaining and operating a public warehouse being a public employment, and involving a public interest, comes within the principle that in matters of public concern the voice of the majority should govern.

Without intimating any opinion as to the correctness of the view here presented by the appellee, it seems to us plain that even if the case is one where the decision of the majority should govern, the minority had a right to notice and to be consulted. Their place of business was but a short distance from that of appellees. It was entirely practicable, at all times, to keep them advised of the business purposes of the majority, and to accord them an opportunity of presenting to their co-proprietors, for respectful consideration, such objections as they might have thereto. The majority, even if they had a right to the

C. B. & Q. R. R. Co. et al. v. Hoyt et al.

ultimate control of their joint business enterprise, had no right to act without information to, or consultation with the minority: Story on Part. § 123.

The evidence shows that the whole project of soliciting consignments of grain to the Union Elevator over the Chicago, Burlington and Quincy Railroad, and of competing for the storage of grain shipped over that road, was conceived and determined upon by the appellees entirely without notice to, or consultation with, their co-proprietors, Armour and Munger. The plan seems, in fact, to have been studiously and carefully kept from their knowledge.

The warehouse was completely overhauled and repaired for the express purpose of fitting it for this new departure in the storage business. Yet Armour and Munger were induced to yield their assent to such repairs, and to pay one-fourth of the very large expense thereby incurred, by representations as to the general dilapidation and decay of the premises, while as to the real object of the repairs they were kept in profound ignorance. Whatever may ordinarily be the power of the majority in interest over the business of a public warehouse, we cannot concede their right to exercise such control in utter disregard of the rights and wishes of the minority. Says Mr. Story, in the section above cited: "If the majority should choose wantonly to act without information to, or consultation with the minority, it would hardly be deemed a *bona fide* transaction, obligatory upon the latter." We think, under the facts in this case, the majority have not entitled themselves, as against the rights and wishes of the minority, to the relief prayed for in the supplemental bill.

We do not understand that the right of appellees to an injunction restraining appellants from removing the side-track in controversy, has been seriously questioned by appellants. In our opinion, the decree to that extent should be affirmed. In so far as relief is decreed under the supplemental bill, the decree is erroneous, and should be reversed.

Other questions are presented by the record which we do not deem it necessary for us to consider or decide, but in accordance with the principles above enunciated, the cause will be

Empire Fire Ins. Co. of Chicago v. Real Estate Trust Co.

remanded to the court below, with instructions to modify the decree by striking out all relief decreed under the supplemental bill, and by ordering that the supplemental bill be dismissed.

Remanded.

THE EMPIRE FIRE INSURANCE CO. OF CHICAGO,
v.
THE REAL ESTATE TRUST COMPANY.

1. PRACTICE—FILING AMENDED PLEAS—IMPOSING TERMS.—Leave to amend pleadings necessary to present an issue on the merits of a cause is no longer discretionary with the court, but is the legal right of the party, and where proper application is made for leave to amend pleas, on sustaining a demurrer thereto, the court has no right to require the defendant to show by an affidavit of facts in detail, a meritorious defense to plaintiff's action. Such terms cannot be imposed as a condition of amending pleas, under the statute authorizing amendments.

2. MEANING OF "JUST AND REASONABLE" TERMS.—The terms "just and reasonable," as employed by the legislature in the Practice Act, obviously have reference to the rules of practice then existing by the common law, and contemplate no other or different terms than would be just and reasonable, judged of by that practice.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. H. F. VALETTE, for appellant; that the affidavit required by the court was not authorized by the statute, cited *Robinson v. Burkell*, 2 Scam. 278.

That it was error for the court to refuse to allow the amendments, without imposing terms: *Drake v. Drake*, 83 Ill. 526; *Heslip v. Peters*, 3 Scam. 45; *Beardsley v. Gosling*, 10 Chicago Legal News, 170; *McCormick v. Wells*, 83 Ill. 239; *Hays v. Loomis*, 84 Ill. 18; 1 Chit. Pl. 509.

Messrs. HERBERT, QUICK & MILLER, for appellee; that the imposition of terms was in the discretion of the court, cited *Rev. Stat. 1874, Chap. 110, § 24*; *Phillips v. Dana*, 1 Scam. 498;

Empire Fire Ins. Co. of Chicago v. Real Estate Trust Co.

Heslip v. Peters, 3 Scam. 45; Miller v. Metzger, 16 Ill. 390; Misch v. McAlpine, 78 Ill. 507; McCord v. Crooker, 83 Ill. 556.

And that this court will not review the exercise of discretion in the court below: Phillips v. Dana, 1 Scam. 498; Garner v. Crenshaw, 1 Scam. 143; Heslip v. Peters, 3 Scam. 45; Greenleaf v. Roe, 17 Ill. 474; Rich v. Hathaway, 18 Ill. 548; Scales v. La Bar, 51 Ill. 232; Mason v. McNamara, 57 Ill. 274.

That the amended pleas were defective, and would have been demurrable if filed, and the court was under no obligation to receive them, the first plea concluding to the country upon a matter properly to be judged by the court: Eppes v. Smith, 4 Munf. 466; Brady v. Commonwealth, 1 Bibb, 517; Boucher v. Williamson, 1 Dana, 227; Brier v. Woodbury, 1 Pick. 362.

The second plea, being a plea to the jurisdiction, does not purport to be pleaded by attorney: Nispel v. W. U. R. R. Co. 64 Ill. 311.

Nor does it deny by positive averments every fact from which jurisdiction may arise: Welch v. Sykes, 3 Gilm. 197; Harrod v. Barrette, 1 Hall, 155; Shumway v. Stillman, 4 Cowen, 292.

MURPHY, P. J. The appellee commenced its action of debt against the appellant in the Superior Court of Cook county to the December term, A. D. 1877, to recover upon the record of a judgment of the United States Circuit Court for the Southern District of New York. The trial in the court below resulted in a judgment against the appellant, from which it prayed an appeal to this court, and brings the record here and asks a reversal of the judgment, assigning as error (1), that the court erred in refusing leave to file amended pleas except on condition that defendant should file an affidavit, setting out therein in detail the facts showing a meritorious defense in said cause; (2), that the court erred in requiring an affidavit of defendant as a condition precedent to filing amended pleas; (3), that the condition imposed upon defendant was not statutory nor authorized thereby, nor authorized by common law.

The first error assigned really presents the whole question, and its consideration will dispose of the other two.

It appears that to the plaintiff's declaration the defendant in

Empire Fire Ins. Co. of Chicago v. Real Estate Trust Co.

the court below filed two pleas, to which the appellee filed demurrers, which were sustained by the court, and thereupon appellant moved the court for leave to file amended pleas, to which the appellee objected, that the court granted leave to appellant to do so upon the condition, and only upon the condition, that the appellant should first present an affidavit in which should be set out the facts in detail, showing a meritorious defense in said cause; that the court prescribed no other terms as a condition to be performed or done by appellant before filing amended pleas. It is conceded by counsel for the appellee that the appellant had the legal right, under the twenty-fourth section of the Practice Act, to amend his pleadings after a demurrer had been sustained to them, but it is insisted that the court had the discretionary power to fix the terms on which such leave to amend should be granted, and that the terms fixed by the court, that is requiring the affidavit as above stated to be filed by the appellant, was the reasonable and proper exercise of that power. By the above section it is provided that, "At any time before final judgment in civil suits, amendments may be allowed on such terms as are just and reasonable." In this case leave to amend was granted, but on terms which appellant claims were not just and reasonable, but were oppressive and unauthorized by law, either by the statute or common law.

This presents the question whether the court, in its discretion, had the right to impose such terms as a condition to granting leave to appellant to file amended pleas. Leave to amend pleadings necessary to present an issue on the merits of a cause is no longer discretionary with the court, but is the legal right of the party. *Drake v. Drake*, 83 Ill. 526. In this case there is no objection to granting leave, because the same was not asked for in apt time, for it appears that immediately upon the announcement of the court that the demurrers were sustained to the pleas filed, appellant moved for leave to file amended pleas, and presented two pleas, one *nul tiel record* and one that the court rendering the judgment sued on had no jurisdiction of the person of the appellant. This motion the court refused to allow except on the condition above stated. We know of no rule of practice by which the court had a right to impose such terms.

Empire Fire Ins. Co. of Chicago v. Real Estate Trust Co.

We have been referred to no case, nor have we been able to find one, showing that it had any such power by the common law; nor are we aware of any statute authorizing such a practice. In the case of *McCormick v. Wells*, 83 Ill. 240, the court had this form of affidavit before it, wherein the court below had required it to be filed as an affidavit of merits; the court say: "No statute has made it the duty of the defendants to file an affidavit setting forth in detail such facts as would satisfy the court that they had a meritorious defense to plaintiff's cause of action, and for that reason they were not bound to observe the rule."

To the same effect is the holding of the court in the case of *Hays v. Loomis*, 84 Ill. 18.

We think terms "just and reasonable," as employed by the legislature in the above section of the practice act, obviously has reference to the rule of practice then existing by the common law, and contemplated no other or different terms than would be just and reasonable, judged of by that practice. By the common law, no such terms as here required were imposed as a condition to granting leave to amend, and to hold that it might be imposed here is to sustain a principle which, carried to its logical sequence, would permit the opinion of the court below to impose condition after condition upon parties, until a statute wise and generous in provision and spirit shall be frittered away and defeated entirely. It is urged by appellee that the appellant was in default after demurrers were sustained to its plea. This position we think untenable. But for the statute giving appellant the legal right to amend, there might be force in the position, but it is not perceived how it could be in default, so long as it had the legal right to amend. If by the law the right is guaranteed to it, we are unfamiliar with any principle of law by which it can be declared to be in default. We think that under the statutes of this State, leave to amend as in this case is a matter of right and without terms at all.

The learned judge who presided at the trial below, took a different view, and denied the appellant leave to file amended pleas, which we think was error, and for which the judgment of the court below is reversed and cause remanded.

Judgment reversed.

Dupue et al. v. McCausland.

EUNICE E. DUPUIE ET AL.

v.

JAMES McCAUSLAND, use, etc.

1. **SUIT ON APPEAL BOND—DECLARATION—VARIANCE.**—In a suit upon an appeal bond, the plaintiff is bound to show a breach, and in describing the judgment appealed from he is bound to set it out with such reasonable accuracy as to identify and distinguish it from others. An allegation of a judgment against two, does not so describe, and is not supported by proof of a judgment against one only.

2. **ALLEGATION OF BREACH—EVIDENCE IN SUPPORT OF.**—The bond sued on was conditioned "to pay all rents becoming due from the commencement of the suit," etc., and plaintiff averred that rent was due to the amount of \$225. In support of this, plaintiff testified that the original lease was destroyed in the great fire, and produced a paper which he testified was "a substantial copy" of the original lease; and that he was positive it was correct as to the parties and the rent. *Held*, it was not sufficiently shown to be a copy; the proof upon that point was too uncertain, and involved matter of opinion as to what was of the substance of the lease.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. RUFUS KING and Mr. A. C. STORY, for appellants; contending that there was a variance between the allegation and proof, and that the Court admitted improper evidence, cited *Rastall v. Stratton*, 1 H. Bl. 49; *Woodford v. Ashley*, 11 East, 508; *Baynes v. Forrest*, 2 Strange, 822; *United States v. McNeal*, 1 Gall. 387; *Whitaker v. Bramson*, 2 Paine, 209; *Giles v. Shaw*, Breese 91; *Pitkin v. Yaw*, 13 Ill. 251; *Boynton v. Robb*, 41 Ill. 349; *Spangler v. Pugh*, 21 Ill. 85; *Ducommun v. Hysinger*, 14 Ill. 249; *Wickenkamp v. Wickenkamp*, 77 Ill. 96.

That the damages, if any, for a breach, were unliquidated, and interest is not allowable: *Bouv. Law Dic.* 626; *Sedgwick on Damages* 430; *Rev. Stat. Chap 74*; *Buckmaster v. Grundy*, 3 Gilm. 626; *Dowling v. Stewart*, 3 Scam. 195; *March v. Wright*, 14 Ill. 248; *Ill. Cent. R. R. Co. v. Cobb*, 75 Ill. 148.

That the Court erred in admitting secondary evidence of the

Dupuie et al. v. McCausland.

lease: 2 Phillips on Ev. 568; 1 Greenl. on Ev. § 508; 1 Starkie on Ev. 229; Kerns v. Swope, 2 Watts, 75; King v. Worthington, 73 Ill. 161.

Upon the question of the measure of damages in the suit: Kennicott v. Sherwood, 22 Ill. 190; Otto v. Jackson, 35 Ill. 349; Prickett v. Ritter, 16 Ill. 96; Hogsett v. Ellis, 17 Mich. 352; Green v. Williams, 45 Ill. 206; Cilley v. Hawkins, 48 Ill. 311; Clapp v. Noble, 9 Chicago Legal News, 168.

That the Court erred in giving an instruction which took from the jury the consideration of a material fact: Yundt v. Hartrunft, 41 Ill. 9; Hassett v. Johnson, 48 Ill. 68; Farman v. Childs, 66 Ill. 544.

The Practice Act enumerates the papers that may be taken by the jury, and an enumeration of these is an exclusion of all others: Broom's Legal Max. 651, Co. Litt. 2100; Smith v. Wise, 58 Ill. 141; Cox v. Straisser, 62 Ill. 383; Hatfield v. Cheany, 76 Ill. 488; Dempsey v. The People, 47 Ill. 323; Yoe v. The People, 49 Ill. 410; Sprange v. Craig, 51 Ill. 288; Page v. Wheeler, 5 N. H. 91; Willis v. Forest, 2 Duer, 310.

MESSRS. BARKER, BUELL & BARKER, for appellee; argued that the variance was immaterial, and that the objection should have been made in the court below, and came too late in this court, and cited the Chicago & Alton R. R. Co. v. Morgan, 69 Ill. 492; Wilson v. King, 83 Ill. 232; Reinback v. Crabtree, 77 Ill. 182; Frazer v. Smith, 60 Ill. 145; McCarthy et al. v. Chicago, 53 Ill. 38.

As to sufficiency of the evidence offered: 1 Greenl. Ev. § 84; Starkie on Ev. 497; Lombard v. Johnson, 76 Ill. 599.

As to the measure of damages, and right to recover interest: Rev. Stat. Chap. 77, § 2; Magner v. Knowles, 67 Ill. 325; Clapp v. Noble, 9 Chicago Legal News, 168.

PLEASANTS, J. This was an action of debt upon three appeal bonds, executed by Emma E. Dupuie as principal, and Isaac Coals as surety. The first recites that appellee recovered a judgment before a justice of the peace against said Dupuie and one Adolphus Duby, from which she appealed; and contains

Dupuie et al. v. McCausland.

the usual condition that she will prosecute it with effect and pay whatever judgment the Court shall render upon the dismissal or trial thereof. The declaration avers that upon the trial of said appeal the Circuit Court rendered judgment in favor of the plaintiff, against said Dupuie and Durby, and assigns for breach that defendants have not paid said judgment.

To prove this breach plaintiff offered in evidence the record of a decree of the Circuit Court restoring a destroyed record of said court which showed a judgment against said Depuie, impleaded with Adolphus Duby—which was admitted against objection by defendants. We are of opinion that this was error. In *McCarthy v. The City of Chicago*, 53 Ill. 43, which was a suit upon a bond to indemnify the city, among other things, against judgments for certain specified causes, objection was made to the introduction of the record offered, for variance—that the judgment thereby shown did not appear to be the same as that described in the declaration. But the description was true so far as it went, and the Court held that it went far enough; that while the same strictness was not required in setting out a breach as in describing an instrument which was the foundation of the action, it must be reasonably specific, so as to apprise the party of what was intended to be charged; and said: “In declaring on this bond, appellee was bound to show a breach; and in doing so was compelled to describe the judgment with such reasonable accuracy as to identify and distinguish it from others. That has been done in this case, as it designated the parties, the court, the date and amount.”

In *Boynton v. Robb*, 41 Ills. 349, which was debt upon a bond, given on suing out an injunction to restrain the collection of a judgment, in which the judgment was described in the declaration as for \$259.75, and the record offered showed one for \$249.75, the court recognized the rule laid down in 1 Chitty on Pl. 295, that every allegation, even in an indictment, which is “material and not impertinent and foreign to the cause, and which cannot be rejected as surplusage must be proved as alleged,” and held the variance fatal.

Dupuie et al. v. McCausland.

The 21st Sec. of the Practice Act requires that in suits upon penal bonds, the conditions shall be set out and breach assigned; and further, that they shall be proved, although no plea be interposed, before the plaintiff can recover, as he did in this case, more than nominal damages. The judgment then, although not the foundation of the action, was an essential part of his case, because necessary to an assignment of the breach. It was incumbent on him, therefore, to describe it with such accuracy as to identify and distinguish it from others. We hold that the allegation of a judgment against two, does not so describe, and is not supported by proof of a judgment against only one; and we see no way to overcome this difficulty but to amend the restoring decree or correct the bond.

The other bonds counted upon, recite a judgment in forcible detainer, and contain the further condition that appellant shall pay all rents becoming due from the commencement of the suit until the final determination thereof. The declaration averred that rent to the amount of \$225, had so become due, and assigned for breach that defendants had not paid the same nor any part thereof.

The only evidence relied on to show the amount or any particular amount of rent accrued, was the lease. To prove this the plaintiff himself was called as a witness, and testified that the original was destroyed in the great fire—that the paper which he produced was a substantial copy—that it was made by his attorney at his direction, and that he was positive it was correct as to the parties and the rent,” and thereupon the paper was offered in evidence, and, notwithstanding objection by defendants, admitted by the Court and read to the jury. This, also, we think, was error. It was an attempt to prove the contents of a lost paper by copy, but the paper produced was not properly or sufficiently shown to be a copy. The proof upon that point was too uncertain, and involved matter of opinion as to what was of the substance of the lease, which the witness was not competent to state.

For these errors, the judgment is reversed and the cause remanded.

Reversed and remanded.

THE MICHIGAN CENTRAL RAILROAD COMPANY, Gar-
nishee, etc.

v.

THE CHICAGO & MICHIGAN LAKE SHORE RAILROAD
COMPANY, use, etc.

1	399
50	402

1. GARNISHMENT—RAILROAD COMPANY NOT LIABLE TO, WHEN.—A railroad company is not liable to garnishment for cars received of a connecting line, under running arrangements existing between them, such as are usually adopted by connecting lines throughout the country, whereby instead of unloading and transferring their freight from the cars of one company to the cars of the other at the points of connection, each received from the other the cars loaded with freight and hauled them to the place of destination on its own line of road, and after discharging the freight, returned the cars as soon as practicable in due course of business.

2. CONSTRUCTION OF STATUTE—WORD "PERSON" USED IN A RESTRICTED SENSE UNDER CERTAIN CIRCUMSTANCES.—The Attachment Act provides for summoning as garnishees "all persons" whom the creditor shall designate, etc., and while this term is sufficiently broad and comprehensive to charge as garnishees all persons having any property, estate or effects of the debtor, yet various considerations of public policy may intervene, in the light of which it is assumed that the legislature intended a more restricted application of the statute than the language employed would seem to import.

3. COMMON CARRIER.—EXEMPT FROM GARNISHEE PROCESS.—Although a railroad company, in so far as its organization and proprietorship of its franchises is concerned, is a private corporation; yet, so far as it performs the functions of a common carrier, its duties are public. A common carrier is bound to serve the public fairly and without unjust discrimination; and to transport and deliver freight with reasonable dispatch, and in the absence of express contract, nothing can excuse it for non-delivery at the point of destination, except the act of God or the public enemy. Hence there would seem to be no reason why substantially the same considerations which exempt public officers and agents in the discharge of their official duties from the operation of the statute, may not also be extended to the case of common carriers, whenever its application will manifestly and necessarily interfere with the proper discharge of their public duties.

4. SET-OFF BY GARNISHEE.—The answer of the appellant to the garnishee process, denied any indebtedness to the defendants in the original suit, and alleged that at the time of service of the garnishee process, the appellee was indebted to appellant in a large amount, and offered to set off a sufficient amount of the indebtedness to it from the appellee to cover the full value of the cars held by appellant. Had there been no garnishee process the appellant

M. C. R. R. Co. v. C. & M. L. S. R. R. Co.

would have had no right, under its arrangement with appellee, to retain the cars of appellee in satisfaction of its debt. It seems to be the policy of the statute to so provide, that, in garnishee proceedings, where a creditor intervenes and seeks to make his debt out of the assets of the debtor in the hands of the garnishee, the rights and remedies of the garnishee and the debtor, as between themselves shall, in no respect, be extended or abridged, but remain precisely as though the writ had not issued. The statute does not purport to give the garnishee any rights, as against the defendant corporation, which it would not have had in case no garnishment writ had been issued, and the claim of set-off was properly denied.

5. **PARTIES—MORTGAGED PROPERTY—RIGHTS OF BONDHOLDERS.**—The garnishee in this case averred in its answer, that the property in question with other property had, before the service of the garnishee summons, been conveyed to certain parties, trustees, to secure different issues of its bonds, to an amount exceeding the value of the property in suit, and said bonds were still unpaid. It does not appear that any or all of the defendants had any beneficial interest in the cars in question; the railroad company, appellee, having a mere equity of redemption, and the persons named as trustees holding only the legal title for the benefit of the bondholders, against whom the attaching creditor had no rights. Before the creditor was entitled to a money judgment against the garnishee, he should at least have shown that his debtors had some beneficial interest in the property in the garnishee's hands capable of being estimated, and in view of the trusts disclosed it is doubtful if he was entitled to relief, without first resorting to equity to have such trusts ascertained and administered.

6. **RAILROAD MORTGAGE—WHAT PROPERTY PASSES UNDER VALIDITY OF LIEN.**—It is well settled in this State that the rolling stock of a railroad is a part of the realty, so as to pass by a conveyance or mortgage of the road. Independently of this, the validity of the lien under the laws of Michigan upon the cars conveyed by the deeds of trust is directly averred in the answer, and its validity in that State will be assumed. If valid by the law of the place where created, it will be enforced here.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. WIRT DEXTER and Mr. JOHN J. HERRICK, for appellant; that in order to charge the garnishee on his answer, there must be in it a clear admission of indebtedness, and if there is reasonable doubt whether he is chargeable, he is entitled to judgment in his favor, cited Drake on Attachment, § 659; Pierce v. Carlton, 12 Ill. 358; Wilhelmi v. Haffner, 52 Ill. 222; Foster v. Walker, 2 Ala. 177; King v. Carhart, 18 Geo. 630.

Upon the question of liability of a railroad company to garnishment: Rev. Stat. 529; Rev. Stat. 147; Merwin v. City of Chicago, 45 Ill. 133; I. C. R. R. Co. v. Cobb, 48 Ill. 402; Drake on Attachments, §463; Staniels v. Raymond, 4 Cush. 314; Stickney v. Batchelder, 18 N. H. 40; Ryegate v. Wardsboro, 30 Vt. 746; Chanute v. Martin, 25 Ill. 63.

As to the rights of the bondholders under the mortgage, and that garnishment is a legal proceeding, and affects only legal rights, equitable interests not being within the purview of the statute: Webster v. Steele, 75 Ill. 544; May v. Baker, 15 Ill. 89; Haven v. Low, 2 N. H. 13; Picquet v. Swan, 4 Mason, 443; Badlam v. Tucker, 1 Pick. 399; G. & C. U. R. R. Co. v. Menzies, 26 Ill. 121; Drake on Attachment, §539.

That the property in question passed under the mortgage without possession: Palmer v. Forbes, 23 Ill. 301; Titus v. Mabee, 25 Ill. 257; Titus v. Ginheimer, 27 Ill. 462; 1 Jones on Mortgages, §453; Drake on Attachment, §665.

That the appellant is a foreign corporation, and not subject to garnishment: Gould v. Housatonic R. R. Co. 1 Gray, 424; Taft v. Mills, 5 R. I. 393; Phillipsburgh Bank v. L. R. R. Co. 3 Dutch. 206; Drake on Attachment, §477.

Mr. W. T. BURGESS, for appellee; that the cars in possession of appellant are liable to process of garnishment, cited Adams v. Scott, 104 Mass. 164; Drake on Attachment, §463.

That the lien, if any, upon the property created by the laws of another State, cannot be enforced in this State: Herman on Executions, §362.

A foreign corporation may be garnisheed in this State: Rev. Stat. 1874, 290; Drake on Attachment, §476; Branser v. New England Ins. Co. 21 Wis. 506.

BAILEY, J. Albert D. Loomis brought suit in the Superior Court of Cook county against the Chicago and Michigan Lake Shore Railroad Company, and William Minot, and J. Lewis Stackpole, "trustees." In aid of this suit a writ of attachment was sued out and served on the Michigan Central Railroad Company, as garnishee, and on trial of said suit between the

original parties thereto, a judgment was rendered against the defendants for \$6,071.51 and costs. The garnishee appeared and filed its answer, and upon the facts thereby disclosed, the Superior Court rendered judgment against said garnishee for the full amount of the judgment in the original suit, interest and costs. The questions presented for our consideration by the present record, grow out of the rendition of the last mentioned judgment.

By its answer the garnishee denied all indebtedness to the defendants in the original suit, and alleged that at the time of the service of the writ of garnishment, the Chicago and Michigan Lake Shore Railroad Company was on the other hand indebted to said garnishee in the sum of \$140,986.13, of which a balance of \$124,986.13, with interest, was unpaid at the date of the answer. The only ground upon which the judgment against the garnishee was based, was the possession by it at the date of the service of the writ, and between that time and the date of the answer, of certain cars of the Chicago and Michigan Lake Shore Railroad Company. The circumstances of the possession of these cars by the garnishee, as disclosed by the answer, are as follows: The railroads of these two railroad companies form connecting lines, and at the time of the service of the writ, running arrangements existed between said companies, such as are usually adopted by connecting lines of railroad throughout the country, in the management of their freight business, by which, instead of unloading and transferring their freight from the cars of the one to the cars of the other at the points of connection, each received from the other the cars loaded with freight, and hauled them to the place of destination on its own line of road, and after discharging the freight returned the cars as soon as practicable in due course of business. This method of doing business had become a part of the general system of freight transportation throughout the country, so that it would have been practically impossible for the garnishee to carry on its business without arrangements of this character with connecting lines, and under such arrangements the garnishee was in the habit of receiving from time to time, and returning, the cars of other railroads from almost

every part of the country, amounting to thousands yearly.

The answer discloses that on the day of the service of the writ, the garnishee received under such arrangement three box cars and seven flat cars, belonging to the Chicago and Michigan Lake Shore Railroad Company, and after the service of the writ, and up to the time of filing the answer, it in like manner received under said arrangement eighty-two box cars and three hundred and sixty-two flat cars of said company, all of which had been returned as soon as practicable after their receipt, in due course of business. The answer avers that said box cars did not exceed in value \$250 each, and said flat cars \$200 each, which would made the total value of all of said cars amount to not exceeding \$95,050.

The first question presented is, whether a railroad company is liable to garnishment for cars received of a connecting line under the circumstances and for the purposes disclosed by the answer of the garnishee. We are referred to no case in which this precise point is decided, and we are therefore compelled to base our conclusions upon such principles as seem to us applicable to the case, unaided by any decisive authority. We regard the question as one of great practical importance, and, so far as the time at our disposal has permitted, we have given it careful consideration, aided by the able arguments furnished us by the counsel for the respective parties.

The Attachment Act provides for summoning as garnishees *all persons* whom the creditor shall designate "as having any property, effects, choses in action or credits in their possession or power, belonging to the defendant, or who are in any wise indebted to such defendant." (R. S. 1874, Chap. 11, § 21.) The statute in relation to garnishment provides for summoning as garnishee "*any person* indebted to the defendant, or having any effects or estate of the defendant in his possession, custody or charge." (R. S. 1874, Chap. 62, § 1.) Although these statutory provisions are sufficiently broad and comprehensive in their language to charge as garnishees all persons having any property, effects or estate of the debtor in their possession, custody or power, yet upon principles generally recognized by the courts of the country, numerous cases exist to which it

M. C. R. R. Co. v. C. & M. L. S. R. R. Co.

is held that statutes of this and a similar character have no application. Various considerations of public policy intervene, in the light of which it is assumed that the legislature intended a much more restricted application of the statute, than the language employed would seem to import. Accordingly it has long been held that no person deriving his authority from the law and obliged to execute it according to the rules of law, can be charged as garnishee in respect to any money or property held by him in virtue of that authority. *Brooks v. Cook*, 8 Mass. 246; *Colby v. Coates*, 6 Cush. 558. Upon this principle it is held that executors, administrators, guardians, sheriffs, clerks of courts, receivers, trustees of insolvents, assignees in bankruptcy, municipal corporations, and various other officers and persons holding money or property as the agents and under the authority of the law, cannot be charged as garnishees.

In case of these public offices and trusts which are to be executed under prescribed regulations, it would to an extent which a due regard to public policy will not tolerate, tend to distract or embarrass the officer, trustee or municipal corporation, if, in addition to the ordinary duties and functions which the law imposes, often multiplied, arduous and responsible in themselves, they are drawn into conflicts created by the interposition of creditors, and compelled to attend to rival attachments, answer interrogatories on oath, and be put to trouble and expense for the benefit of third persons in no way connected with the fund or property in their hands, nor within the duties of their trusts.

Although a railroad company, so far as its organization, and the proprietorship of its franchises and property is concerned, is simply a private corporation, yet so far as it performs the functions of a common carrier its duties are public. It has long been held that a common carrier exercises a *public employment*, the duties and liabilities pertaining to which are clearly defined and regulated by law. *C. & A. R. R. Co. v. The People*, 67 Ill. 11. A common carrier is bound to serve the public fairly and without unjust discrimination, and to receive, transport and deliver freight when offered with reasonable dispatch, and to furnish all reasonable facilities for such transportation.

M. C. R. R. Co. v. C. & M. L. S. R. R. Co.

In the absence of express contract, nothing can excuse it for the non-delivery at the point of destination of the goods received, except the act of God or the public enemy. We are unable to perceive why substantially the same considerations of public policy which exempt other public officers and agents in the discharge of their official duties from the operation of the statute in relation to garnishment, may not also be extended to the case of common carriers, whenever the application of the statute will manifestly and necessarily interfere with the proper discharge, on the part of the carrier of its public duties and functions.

If the statute should be allowed the operation sought to be given it in the present case, it would, beyond doubt, very seriously interfere with the transportation of freights by railroad, according to the method which experience seems to have developed as the speediest, most economical and best. Our railroads extend into all parts of the country, and traverse all of the various States of the Union, forming one great and complicated system of internal communication, so that for most of the practical purposes of transportation, each railroad, instead of constituting a separate line, is only a part or member of this general system. Cars may be loaded at any point upon one railroad and transported, without unloading, to the point of destination on any other railroad, however distant. It cannot be doubted that this method of conducting the carrying business of the country greatly subserves the public convenience, and should not be interfered with for the mere prosecution of individual and private ends, except for very strong and controlling reasons.

If a car, as soon as it passes from the line of road of its owner on to the line of another company becomes subject to process of garnishment, no railroad company owing debts can safely allow its cars to pass beyond its own line for any purpose; nor can any company, without exposing itself to the annoyance of continual litigations between other parties and in which it has no interest, receive the loaded cars of other companies for transportation to their place of destination. The doctrine contended for by appellee would make each railroad company an agency

M. C. R. R. Co. v. C. & M. L. S. R. R. Co.

for the collection of the debts and liabilities of every other railroad company with whose track its line of road is immediately or remotely connected. The railroad companies would be compelled either to abandon the present economical and expeditious system of transportation, or carry it on at the risk of being continually drawn into controversies between third parties, and of being exposed to expensive and vexatious litigations in which they have no interest.

Still further, under our statute the writ of garnishment holds not merely the property in the hands of the garnishee at the time of the service of the writ, but all property of the debtor which may thereafter come into its possession up to the date of filing the answer, which may be months afterwards. By the construction of the statute contended for, the garnishee would be obliged at its peril to retain in its custody all cars received from the debtor corporation prior to the date of the answer, and hold them through the course of the litigation between the original parties to the suit, however protracted, so as to be ready to deliver the same to the sheriff at the issuing of execution. Thus each line of railroad would, on service of a writ of garnishment, become, so to speak, a sort of *cul-de-sac*, into which the cars of the debtor corporation might run up to the time of filing the answer, but from which there would be no escape until the judgment of the attaching creditor was recovered, and his execution satisfied. Such an interference by creditors with the operations of common carriers in the exercise of their public employment, is, we think, so far in conflict with sound public policy as to warrant us in holding that the cars of one company in the possession of another, under the circumstances disclosed by the present record, are not liable to garnishment.

In *I. C. R. R. Co. v. Cobb et al.* 48 Ill. 402, it was held that a railroad company could not be held as garnishee for property in its possession as common carrier consigned to the debtor while in *transitu* on its route. The Supreme Court base this decision simply upon the inconvenience which would result from the adoption of a different rule. They say: "Any other rule would make railway companies collecting agents of creditors,

and that too at the risk of these companies. They are common carriers of all kinds of manufactured and agricultural products, having a lien upon the articles delivered for the freightage. They are obliged under ordinary circumstances to carry all that shall be delivered to them, and they discharge their duty by carrying and delivering according to the contract. It is not their business, nor is it their interest to know to whom the various articles belong, nor should it be required of them that conflicting claims to the property entrusted to them should be adjusted through controversies, the burden, annoyance and expense of which they must bear."

We think the argument *ab inconvenienti* applies in the case before us quite as strongly as in the one above cited.

The next question for consideration grows out of the offer of the garnishee to set off a sufficient amount of the indebtedness to it from the Chicago and Michigan Lake Shore Railroad Company, to cover the full value of all of said cars, which offer was disallowed by the court. The statute under which the right to such set-off was claimed, is as follows:

"Every garnishee shall be allowed to retain or deduct out of the property, effects or credits in his hands, all demands against the plaintiff, and all demands against the defendant of which he could have availed himself if he had not been summoned as garnishee, whether the same are at the time due or not, and whether by way of set-off on trial or by set-off of judgments or executions between himself and the plaintiff and defendant severally, and he shall be liable for the balance only after all mutual demands between himself and plaintiff and defendant are adjusted, not including unliquidated damages for wrongs and injuries." (R. S. 1874. Chap. 62, § 13.)

We are inclined to doubt the right of the garnishee to avail itself, under this statute, of the set-off claimed. The statute does not purport to give the garnishee any rights, as against the defendant corporation which it would not have had in case no garnishee writ had been issued. It merely provides that the garnishee may retain or deduct out of the property effects, etc., all demands against the defendant of which it could have availed itself had it not been summoned as garnishee. Now

M. C. R. R. Co. v. C. & M. L. S. R. R. Co.

if no garnishee summons had issued in this case, we are unable to perceive upon what claim of right the Michigan Central Railroad Company could have retained in its possession the cars which it from time to time received from the Chicago and Michigan Lake Shore Railroad Company, under the arrangement appearing in this case, and applied the same to the satisfaction of its claim against that company. Its debt was in no sense a lien upon said cars. They were received, as is admitted, under an arrangement by which they were to be returned as soon as practicable after being unloaded at their point of destination. Had the Michigan Central Railroad Company attempted to retain said cars and apply the same upon its debt, such act would have been tortious, and not an assertion of any existing right. It seems to be the manifest policy of the statute to so provide that in garnishee proceedings, where a creditor intervenes and seeks to make his debt out of assets of the debtor in the hands of the garnishee, the rights and remedies of the garnishee and the debtor, as between themselves shall, in no respect, be extended or abridged, but remain precisely as though the writ had not issued. Upon this view of the statute, we think the claim of set-off was properly denied.

Another question is presented for our consideration, growing out of the existence of certain incumbrances on these cars in the hands of the garnishee. The answer states that the railroad of the Chicago and Michigan Lake Shore Railroad Company is located in the State of Michigan, and that said company prior to the date of the garnishee writ, conveyed by three successive conveyances its railroad and other property, including all the cars in question, to certain trustees, to secure different issues of its bonds, amounting to several millions of dollars, said conveyances being all duly acknowledged and recorded, and that at the date of said writ, the whole of the indebtedness secured by said deeds of trust, together with interest thereon for several years, was still unpaid, and that the same largely exceeded the value of all the property embraced in said conveyances. The trustees named in said deeds of trust, were James F. Joy and Henry B. Baldwin, but prior to the commencement of the garnishee proceedings, William Minot and J. Lewis

Stackpole were, under the provisions of said deeds of trust, substituted as trustees.

No issue having been taken upon any of the averments of the answer, they must for all the purposes of this suit be taken as true. We are unable to perceive upon what principle the court below, in view of the averments in relation to these deeds of trust, rendered judgment against the Michigan Central Railroad Company for the sum of money recovered by the plaintiff in the original suit. Although the cars in question largely exceeded in value the amount of said judgment, it does not appear that any or all of the defendants to that judgment had any beneficial interest in said cars of any value. Minot and Stackpole were mere trustees, holding the legal title for the benefit of the bondholders. The Chicago and Michigan Lake Shore Railroad Company held a mere equity of redemption in property mortgaged far beyond its value. The beneficial owners were the bondholders, against whom the attaching creditor had no rights. Before the creditor was entitled to a money judgment against the garnishee, he should at least have shown by proper averments and proofs that his debtors had some beneficial interest in the property in the garnishee's hands capable of being estimated at some value in money. We think it doubtful whether in view of the trusts disclosed by the answer the creditor could in any event have entitled himself to any relief against the garnishee without having first resorted to a court of equity in order to have said trusts properly ascertained and administered.

Appellee insists upon the invalidity of these deeds of trust so far as they relate to the cars in question, upon the theory that said cars are personal property and were not reduced to possession by the trustees prior to the service of the writ. In this view we are unable to concur. The law is well settled, in this State at least, that the rolling stock of a railroad is a part of the realty, so as to pass by a conveyance or mortgage of the road. *Palmer v. Forbes*, 23 Ill. 301; *Titus v. Mabie*, 25 Id. 261; *Titus v. Ginheimer*, 27 Id. 462. If a part of the realty, it was not essential to the validity of the lien that possession should be taken.

M. C. R. R. Co. v. C. & M. L. S. R. R. Co.

! Independently of this view, the validity under the laws of Michigan of the lien upon these cars conveyed to the trustees by the deeds of trust, is directly, and we think sufficiently averred by the answer, and we must therefore assume its validity in that State. If valid by the law of the place where created, it will be enforced here. *Mumford v. Canty*, 50 Ill. 370.

Other questions are presented by the record, but as they do not materially affect the merits of the controversy between the parties, we will not take time to discuss them. In view of the conclusions above reached, the judgment must be reversed and the cause remanded.

Reversed and remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1877.

ABRAM A. WILLETT ET AL.
V.
THOMAS G. WOODHAMS ET AL.

1. PLEADINGS IN CHANCERY—PRAYER FOR INJUNCTION.—Where a proceeding is commenced in chancery for relief by way of injunction, the prayer for an injunction must not only be in the prayer for relief, but in the prayer for process.

2. ROADS—INJUNCTION TO RESTRAIN HIGHWAY COMMISSIONERS.—The jurisdiction of a court of equity to afford preventive relief by injunction, to restrain commissioners of highways from appropriating private lands to the use of the public for a highway, is undoubted. Proposed acts of this kind constitute a continuing trespass and may cause irreparable injury. Preventive relief by way of injunction, in cases of this character, is the primary equity, but the jurisdiction, in the first instance, must rest upon the necessity for an injunction, and if the threatened danger be not real, and its prevention urgent, the jurisdiction will not attach.

ERROR to the Circuit Court of Mercer county; the Hon. GEO. W. PLEASANTS, Judge, presiding.

MESSRS. BASSETT & WHARTON for plaintiffs in error; in support of the bill; cited *Alexander et al v. Pendleton*, 8 Cranch. 462; *Rucker v. Dooley et al.* 49 Ill. 377; *Conklin v. Foster*, 57 Ill. 104; *Smith v. Hickman*, 68 Ill. 314; *Moore v. Munn*,

Willetts et al. v. Woodhams et al.

69 Ill. 591; Couwell v. Watkins, 71 Ill. 488; Groves v. Weber, 72 Ill. 606; Phillips v. Pitts, 78 Ill. 72; Sea v. Morehouse, 79 Ill. 216; McIntyre v. Storey, 80 Ill. 127; Trustees, etc. v. Stewart, 43 Ill. 81; 2 Story's Eq. Jur. § 928; Eden on Injunctions, 259; The People v. City of St. Louis, 5 Gilm. 351. Green v. Green, 34 Ill. 320, Rev. Stat. 1874, 913; Laws of 1877, 178.

Messrs. PEPPER & WILSON for defendants in error; that the survey was not evidence of the existence of a road, cited Gentleman v. Soule, 32 Ill. 271.

That a Court of Chancery will not assume jurisdiction to try questions of law to prevent a trespass: Hamilton v. Stewart, et al. 59 Ill. 330.

PILLSBURY, J.—Bill in equity filed by the complainants, Abram A. Willett, Charles W. Swanson and William Fry, alleging that they respectively were owners of certain lands in Mercer county, and that there had been a trail or pathway used occasionally over said lands, varying from year to year as to location and use, for the period of eight or ten years prior to the year A. D. 1874, the lands prior to said year being vacant and unoccupied. That in that year the said complainants enclosed their respective lands with substantial fences, erecting gates for their own convenience where said pathway crossed the line of their respective fences, and permitted other persons to pass through said gateways.

That in the year A. D. 1873, the commissioners of highways for Rivoli township, claiming that said pathway had been used as a public highway for twenty years, caused a survey to be made of the same by right of prescription, and caused the same to be recorded as a public highway.

The bill further alleges that Thomas G. Woodhams, Sidney Durston and J. G. Sexton, commissioners of highways for the township of Rivoli, are threatening to break down and remove the fences of complainants, and throw open their inclosures to the public; and that Thomas Surplus, pretending to act as overseer of highways or as agent of said commissioners, did on

Willetts et al. v. Woodhams et al.

the sixth day of August, A. D. 1877, remove the gates and fences that inclosed the said land of complainant, Abram A. Willett; and is threatening to remove it again, said Willett having rebuilt the said fences and gates. Alleges that there is no public highway over said lands either by location, dedication, prescription, or otherwise, and prays for answers, and that, upon final hearing, defendants may by decree be restrained from removing the gates and fences, and that said survey may be declared illegal and void.

Demurrer was interposed to said bill by defendants, which was sustained by the court and the bill dismissed, whereupon the complainants sued out the writ of error herein. The jurisdiction of a court of equity to afford preventive relief by injunction where commissioners of highways are threatening to appropriate a man's land to the use of the public for a highway, when there is no highway, is clear and undoubted. *Green v. Green*, 34 Ill. 320; *McIntyre v. Story*, 80 Ill. 127.

Proposed acts of this kind would constitute a continuing trespass and might cause irreparable injury, hence the necessity of the exercise of such jurisdiction. This jurisdiction must, however, in the first instance, rest upon the necessity for an injunction. *Hilliard on Inj.*, sec. 9.

Preventive relief by way of injunction in case of tort, like waste and trespass, is the primary equity; and if the threatened danger be not real and its prevention urgent, the jurisdiction will not attach, but the party will be left to the courts of law to settle his legal right.

A party, therefore, seeking relief by way of injunction, must specifically pray for such relief, otherwise the court will not aid him. *Lube's, Eq. Pl.* page 74; *Story Eq. Pl.*, sec. 41; *Savory v. Dyer*, Rob. 70; *Wood v. Braddell*, 3 Sim. 273; 2 *Green's Ch. Sec.* 245; *Dan. Ch. Pr.* pages 447 and 1834.

In *Lewiston Falls Mfg. Co. v. Franklin Co.* 54 Maine, 402, the bill alleged that the defendants stopped the water of the river from flowing to complainants' mills by closing gates and sluiceway erected by defendants above the mills of complainants, thereby wrongfully depriving complainants of the use of

McCoy et al. v. Babcock.

said water, greatly to their loss and injury. Further, that respondents ought to be compelled forthwith to open said gates and sluiceway, and be forever restrained from closing the same; and opposing any other obstruction to a free and full flow of the water to their mills, by injunction. Prayer for answer and general relief.

Upon demurrer to the bill, the court say: "The only relief sought to be obtained by this bill is by way of injunction. The bill, however, does not specifically pray for an injunction. The law seems to be well settled in such case. The prayer for an injunction must not only be in the prayer for relief, but in the prayer for process."

"When a bill prays for relief by way of injunction, but does not pray for the process of injunction, the process cannot be granted."

These authorities are decisive of the question in this case. The bill here is for preventive relief without any prayer for injunction.

The court below properly sustained the demurrer, but under the admitted allegations of the bill we deem it advisable to so modify the decree of the court, that the dismissal of the bill shall be without prejudice to complainants if the defendants shall attempt to put their threats into execution.

The decree of the court will, therefore, be modified to that extent, and each party will pay their own costs in this court.

Decree modified.

JAMES MCCOY ET AL.

V.

ELIJAH C. BABCOCK.

1. PROMISSORY NOTE—WHEN DUE—DAYS OF GRACE.—A promissory note, which by its terms becomes due on the first day of March, 1877, is, by virtue of the statute, entitled to days of grace, and the note is not due, for the purposes of instituting suit thereon, until the expiration of the last day of grace. A plaintiff cannot recover for money not due at the institution of the suit,

McCoy et al. v. Babcock.

2. PRACTICE—HOW OBJECTION MAY BE TAKEN ADVANTAGE OF.—A defendant is not required to raise the objection, that the note was not due at the time of commencement of the suit, by plea in abatement. The plaintiff must show an indebtedness at the time of bringing the suit, or he fails in his action.

3. CONSOLIDATION OF CLAIMS.—The plaintiff holding two notes against the defendant, which when consolidated exceeded the jurisdiction of the justice; he could sue them separately before the same justice on the same day. Each note then constituted a separate demand. If the two notes when consolidated did not exceed the jurisdiction of the justice, then under the statute the plaintiff would be obliged to bring them both forward in one suit.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. J. M. KIRKPATRICK, for appellants; contended that the suit was prematurely brought, the notes not being due, and cited Hamlin et al. v. Race, 78 Ill. 422; Daniels v. Osborn, 71 Ill. 169.

That this objection could be made under the general issue, in a suit brought by appeal from a justice court: Minard v. Lawlor, 26 Ill. 302; Church v. Clark, 21 Pick. 310; Leftly v. Mills, 4 T. R. 170; Boston Bank v. Hodges, 9 Pick. 420; Staples v. Franklin Bank, 1 Met. 43; New England Bank v. Lewis, 2 Pick. 125; Henry v. Jones, 8 Mass. 453; Osborn v. Moncure, 3 Wend. 170; Walter v. Kirk, 14 Ill. 55; 1 Parsons on Notes, 410.

That conceding the jurisdiction of the justice, on appeal to the Circuit Court the proofs alone determine the right of recovery: Allen v. Nichols, 68 Ill. 250; Swingley v. Haynes, 22 Ill. 214; O. & M. R. R. Co. v. McCutchin, 27 Ill. 10; Coulterville v. Gillen, 72 Ill. 599; Waterman v. Bristol, 1 Gilm. 593; Minard v. Lawlor, 26 Ill. 302; Zuel v. Bowen, 78 Ill. 234; Jacksonville v. Block, 36 Ill. 507; Cassieberry v. Forquer, 27 Ill. 170; Lucas v. LeCompte, 42, Ill. 303.

Mr. J. B. CLARK and Mr. ALMON KIDDER, for appellee; that the objection of premature action is matter in abatement only, and must be taken advantage of in apt time, cited 1 Chitty's Pl. 453; Moore's Civil Pr. 470; Archibald v. Argall, 53 Ill.

McCoy et al. v. Babcock.

307; Tisdale v. Minonk 46 Ill. 9; Gilmore v. McCulloch, 26 Ill. 200.

That each note constituted a separate demand, and could be sued separately: Buckner v. Thompson, 11 Ill. 563; Mallock v. Krome, 78 Ill. 110.

PILLSBURY, J. This suit was commenced before a justice of the peace of Warren county, upon the following promissory note:

“\$200.

DENNY, Ill., Feb. 19, 1876.

“On or before the first day of March, A. D. 1877, for value received, we, or either of us, promise to pay Almon Beecher the sum of two hundred dollars.

“This note given to secure the rent on 80 acres of land belonging to above-named party.

“Indorsed: A. Beecher.

“JAMES MCCOY,
JOSEPH MCCOY.”

Judgment was rendered by the justice against defendants, and they appealed to Circuit Court, where upon a trial before the court, a jury being waived, a like result followed.

On the trial below, the defendants objected to the introduction of the note in evidence, on the ground that it was not due at time of the commencement of the suit, and in support of their objection read in evidence the summons issued by the justice, from which it appeared that the suit was commenced March 1, 1877.

Also the transcript of the justice, reciting issuing of summons March 2, 1877. The court overruled the objection, and the defendants excepted, and assign the ruling of the court for error in this court.

This note was by virtue of the statute entitled to days of grace, and whether the summons or the transcript should control as to time of commencement of suit, is immaterial, as in either case the note was not due until the last day of grace, which was two days after suit was instituted.

In fact, it is admitted by the appellee that the suit was prematurely commenced, but claims that advantage should be taken of that by plea in abatement.

We do not so understand the law. A plaintiff is required

McCoy et al. v. Babcock.

to show that the defendant was indebted to him at the time of the commencement of the suit, or he fails in his action.

Our Supreme Court, in *Hamlin, Hale & Co. v. Race*, 78 Ill. 422, say: "We had supposed no rule was more inflexible or better established than that a plaintiff cannot recover for money not due at the institution of the suit," and after citing various authorities, continue: "If this rule could be seriously questioned, other cases could be referred to as establishing the rule; but to our minds it requires no authority, as it is based upon principles obviously just." *Daniels v. Osborn*, 71 Ill. 169, is conclusive upon this point. It was *assumpsit* for goods sold and delivered, and *non-assumpsit* pleaded. The proof was that the goods were sold on credit, and the credit had not expired at the time of bringing suit. The court held that the suit was prematurely brought, and reversed the judgment.

There is no merit in the second point made by appellant. The two notes when consolidated exceeded the jurisdiction of the justice, therefore he could sue them separately before the same justice on the same day. Each note constituted a separate cause of action, and not one entire demand. The rule, therefore, that a party cannot split up an entire cause of action and maintain several suits thereon, does not apply: *Buckner v. Thompson*, 11 Ill. 564; *Mallock v. Krome*, 78 Ill. 110.

If these two notes had, when consolidated, not exceeded the jurisdiction of the justice, then under the statute the plaintiff would be obliged to bring them both forward in the one suit.

As the note was not due at the time of the institution of this suit, the plaintiff cannot recover. The judgment will be reversed and cause remanded.

Judgment reversed.

City of Mendota v. Fay.

CITY OF MENDOTA

v.

MARY V. FAY.

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1. PRACTICE—MOTION FOR NEW TRIAL—ERRORS EXAMINED THOUGH NO WRITTEN POINTS FILED.—Errors of the court below are always subject to review upon appeal, when its action is preserved by bill of exceptions properly taken during the progress of the trial, although a motion for a new trial be not made.

2. NEGLIGENCE—DUE CARE—NO PRESUMPTION OF LAW—BURDEN OF PROOF.—In an action against a municipal corporation for damages arising from the negligence of the corporation in keeping its sidewalks in repair, the question, whether the plaintiff was exercising due care at the time of the accident, is one of fact for the jury to find from the evidence, the law presuming nothing in that regard, and the burden of proof is upon the plaintiff to show affirmatively that she was exercising due care.

3. DUE CARE DEFINED.—Due care is that degree of care that a reasonable and prudent person would exercise under all the circumstances of the case.

4. CONFLICTING TESTIMONY—PROPER INSTRUCTIONS.—Where the evidence upon the question whether the injury received was not the result of the plaintiff's own negligence, is so conflicting that the jury could have found either way upon that point without doing violence to the testimony, it is essential that the jury should be accurately instructed.

5. PROOF OF DUE CARE—RULE AS TO.—It is not intended to establish an absolute rule, in all cases, that the plaintiff must introduce independent evidence of due care upon his part, but that it must appear affirmatively as a fact in the case; and if from all the facts and circumstances in proof surrounding the transaction it thus appears, it will be sufficient; otherwise independent proof must be introduced upon that point.

APPEAL from the Circuit Court of LaSalle county; the Hon. EDWIN S. LELAND, Judge, presiding.

Messrs. BUSHNELL, GILMAN & COOK and Mr G. S. ELDREDGE, for appellant; argued that there was such contributory negligence on the part of the plaintiff as would bar a right of recovery for the alleged injury, and cited *City of Centralia v. Crouse*, 64 Ill. 19; *City of Aurora v. Pulfer*, 56 Ill. 270; *C. & A. R. R. Co. v. Becker*, 76 Ill. 25; *C. & A. R. R. Co. v. Jacobs*, 63 Ill. 178; *C. & A. R. R. Co. v. Gretzner*, 46 Ill. 74; *C. B. & Q. R. R. Co. v. Lee*.

City of Mendota v. Fay.

68 Ill. 576; City of Quincy v. Barker, 81 Ill. 300; Wharton on Neg. §§ 130, 300.

That the burden of proof was upon plaintiff to show affirmatively, exercise of proper care on her part at the time of the alleged injury: Wilds v. H. R. R. Co., 24 N. Y., 432; Johnson v. H. R. R. Co. 20 N. Y., 65; Warner v. N. Y. C. R. R. Co. 44 N. Y. 465; C. & N. W. R. R. Co. v. Coss, 73 Ill. 394; Parker v. Adams, 12 Met. 415; Lane v. Crombie, 12 Pick. 177; Moore v. R. R. Co., 4 Zab. 284; Button v. H. R. R. Co., 18 N. Y., 257; Spalding v. C. & N. W. R. R. Co., 33 Wis. 591; Jackson v. Betts, 9 Con. 225.

That the fourth instruction given for the plaintiff, containing a suggestion in respect to the amount of damages in case they found for the plaintiff, was erroneous: C. R. I. & P. R. R. Co. v. Austin, 69 Ill. 426.

That an instruction as to a presumption of law upon a disputed question of facts is erroneous: Guardian Ins. Co. v. Hogan, 80 Ill. 35.

That appellant was not guilty of negligence in failing to protect its sidewalks by a railing, or neglecting to light its streets: Sparhook v. City of Salem, 1 Allen 30; Randall v. Eastern R. R., 106 Mass. 276; Newcomer v. City of Taunton, 100 Mass. 255.

Mr. L. B. CROOKER and Mr. CHARLES BLANCHARD, for appellee; that plaintiff was not under the circumstances chargeable with negligence, cited City of Quincy v. Barker, 81 Ill. 300; City of Joliet v. Verley, 35 Ill. 58; City of Bloomington v. Bay, 42 Ill. 503.

That under the Practice Act, a motion for a new trial should specify in writing the grounds therefor: Rev. Stat. 1874, 781; Emory v. Addis, 71 Ill. 273.

PILLSBURY, J.—Action by appellee against appellant to recover damages for injuries received by her through the alleged negligence of the city in the construction of a side-walk.

Trial was had in the court below, and verdict in favor of appellee for \$1,200.

City of Mendota v. Fay.

Judgment was rendered thereon by the court, and the city appeals.

Motion for a new trial was made in the court below, but no points in writing were filed as required by the 56th section of the Practice Act, and the objection is here interposed by appellee, that in such case we cannot examine the errors assigned, questioning the action of the court below in overruling such motion.

Viewing the case as we do, it is unnecessary to determine whether this court will review the action of the court below in not setting aside the verdict for errors of the jury when no points are filed particularly calling attention to such errors.

Errors of the court below are always subject to review upon appeal, when its action is preserved by bill of exceptions properly taken during the progress of a trial, although a motion for a new trial be not made.

This was the established practice prior to the statute of 1837, allowing parties to assign for error the overruling a motion for a new trial.

The same rule is still in force. *Smith v. Gillett*, 50 Ill. 290. In that case the court below excluded all the evidence from the jury, and the plaintiff excepted to the action of the court in that regard, and although no motion was made for a new trial, the Supreme Court considered the error assigned, and reversed the judgment.

The court say: "It is error of law of which appellant complains, and to which he excepted at the proper time. No question whatever is made upon the propriety of the verdict, but upon the action of the court. Surely such errors can claim and receive the attention of the appellate court as errors of law which a motion for a new trial could not have reached or remedied."

In *McClurkin v. Ewing*, 42 Ill. 283, it was held that if the bill of exceptions shows that exception was taken to the giving of instructions, the ruling in that regard may be assigned for error, although it does not appear upon what grounds the motion for a new trial in the court below was based.

Such being the rule, it is clear that the Appellate Court must

examine the evidence in the record in order to determine whether the court erred in the admission or exclusion thereof, or in instructing the jury properly upon the issues raised thereon.

In this action, to entitle the plaintiff to recover, it must affirmatively appear from the evidence, first, that the defendant was negligent, and second, that at the time of the injury the plaintiff was in the exercise of due care of her personal safety.

Due care is that degree of care that a reasonable and prudent person would exercise under all the circumstances of the case.

Examination of the evidence in this record discloses a very sharp conflict upon the question whether the injury received by appellee was not the result of her own negligence; and the jury could have found either way upon that point, without doing violence to the testimony.

In such state of the evidence, it is essential that the jury should be accurately instructed: *C. B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510.

Upon the trial below the appellant asked the court to give the following instruction to the jury:

“The jury are instructed that in order that plaintiff should recover in this case, it should appear that at the time of the alleged injury she was exercising ordinary care to avoid injury, and that it was owing to the improper and unsafe manner in which said sidewalk and street crossing in question, at the intersection of Main street with the crossing, was constructed, that she was injured.” This instruction was modified by the court adding thereto the words, “If, however, there is no proof of a want of care on the part of plaintiff, it should be presumed that she was careful rather than that she was careless.”

To which modification the appellant at the time excepted, and assigns the same for error in this court.

While this instruction was not strictly formal, in that it did not require it to appear “from the evidence” that she was careful, yet we are forced to the conclusion that the learned judge erred in attaching thereto the above modification, and then giving it to the jury. Whether the plaintiff was, at the time of the injury, exercising due care, under all the

City of Mendota v. Fay.

circumstances, was a question of fact for the jury to find from the evidence, the law presuming nothing in that regard.

Although the decisions are somewhat conflicting, we believe the decided weight of authority is that the burden of proof is upon the plaintiff to affirmatively show, in the first instance, that he was exercising due care at the time of the injury.

In 21 Pick. 147, it was held, "that, to maintain an action upon the statute for damages, occasioned by want of repair, two things must concur: first, that the highway was out of repair, and secondly, that the party complaining was driving with ordinary care and skill."

"Otherwise, although the way be out of repair, it would not follow that the plaintiff's loss was occasioned by it. Such being the facts necessary to establish plaintiff's case, the burden of proof is, of course, on the plaintiff to show not only defects in the highway, but that he was using due care and skill."

The same court, in a case in many respects like this, say: It is well settled that the burden was on plaintiffs to show that Mrs. Wilson used ordinary care:" *Wilson and Wife v. City of Charleston*, 8 Allen, 138; and in *Allyn v. Boston & Albany R. R. Co.* 105 Mass. 77, the court is even more emphatic. "The burden is upon him, the plaintiff, to show affirmatively that he was exercising due care. The question of due care is generally for the jury to determine, but where the uncontroverted facts in a case show negligence on the part of plaintiff, or where there is no evidence to show that he used due care, it is the duty of the court to instruct the jury to return a verdict for the defendant."

It is not intended to establish as an absolute rule, in all cases, that the plaintiff must introduce independent evidence of due care upon his part, but that it must appear affirmatively as a fact in the case; and if from all the facts and circumstances in proof surrounding the transaction it thus appears, it will be sufficient; otherwise independent proof must be introduced upon that point.

In the case of *Warner v. The N. Y. C. R. R. Co.* 44 N. Y.

the judge below charged the jury that the plaintiff will be presumed to be free from fault if nothing else appears in the case, because it can not be supposed that a man would bring an injury upon himself. The Court of Appeals, in passing upon this charge, say: There is no presumption of negligence against either party.

“It is the duty of the plaintiff to prove, and the right of the defendant who is charged with negligence causing an injury that he should prove by satisfactory evidence that he, the plaintiff, did not contribute to the injury by any negligence upon his own part. This proof, in some form, constitutes a part of plaintiff’s case. It must appear, either from the circumstances of the case, or from evidence directly establishing the fact to the satisfaction of the Court and jury, that the plaintiff is free from fault contributing to the injury.”

To the same effect are the decisions of our own Supreme Court. In *Dyer v. Talcott*, 16 Ill. 300; the judgment below was reversed because the Circuit Court refused to instruct the jury on behalf of defendant, “That the burden of proof in this action is upon the plaintiff to show not only that the defendant was guilty of negligence, but that he himself was not guilty of negligence or carelessness.” Also, in *C., B. & Q. R. Co. v. Gregory*, 58 Ill., 272, the language of the Court is: “Undoubtedly the general rule is that it must affirmatively appear that the injured party was in the exercise of due care and caution.”

“This material fact may be made to appear by circumstantial as well as by direct evidence. It is immaterial how the proof is made, so the fact is made distinctly to appear.”

Authorities above cited sufficiently sustain the doctrine above announced, that whether the plaintiff is in the exercise of due care at the time of the injury, is purely a question of fact to be found by the jury from all the evidence, and not a presumption of law.

Whatever fact is presumed by the law to exist in a given case is, in the absence of proof overcoming such legal presumption, established, and the jury can find the fact from such presumption alone. The party therefore against whom such

Teessen v. Camblin.

presumption arises must overcome the same by evidence, or the presumed fact will be found against him; or if the evidence be equally balanced, the presumption prevails, and the like result must follow.

Such was the condition of the defendant below under the instruction in question; and while it is true that the jury were told in the other instructions that they must find that the plaintiff was exercising due care at the time of the injury, yet they were authorized by this instruction to find the existence of such fact from the legal presumption alone, in absence of proof of want of care upon her part, thereby casting the burden of proof upon the defendant of overcoming such presumption.

The seventh instruction was properly refused, as it does not submit the question to the jury, whether taking the other route would be a proper regard for personal safety under all the circumstances of the case, as there was evidence tending to prove that the route on Sixth street was more dangerous than the route taken by plaintiff.

We see no other error in the record of sufficient importance to notice; but for the error indicated, the judgment must be reversed, and cause remanded.

Judgment reversed.

LELAND, P. J., took no part in the decision of this case.

RICHARD H. TEESSEN

V.

ELIZABETH CAMBLIN.

1. STATUTE OF LIMITATIONS—NEW PROMISE.—To take a case out of the Statute of Limitations, by new promise, the promise must be made to the party seeking its benefit, or to some one authorized to act for him. A promise to a stranger is insufficient to establish a promise to the plaintiff or the party whom he represents. Evidence (if properly admitted, which the court does not concede) of a decree of divorce, wherein it is recited that the

Teessen v. Camblin.

complainant had stipulated in open court, and it was so decreed, that she would pay a certain debt due to K., does not constitute a new promise as to K. He was no party to the record, and from anything that appears to the contrary, was wholly unacquainted with the proceedings in the divorce case.

2. **CONDITIONAL PROMISE WILL NOT REVIVE A DEBT.**—Notwithstanding a party may promise to pay a debt barred by the statute, still, if the promise is a conditional one, or the person promising it at the same time protests against the payment, or that he has a set-off which ought to be deducted, it is insufficient to take the case out of the statute. The promise should be considered in connection with the refusal to pay, as well as the claim of set-off, and the whole admission taken together.

3. **PROOF OF PREVIOUS CONSIDERATION.**—To sustain an action upon a new promise founded on a debt barred by the Statute of Limitations, the previous consideration must be proved.

APPEAL from the Circuit Court of Peoria county; the Hon. JOSEPH W. COCHRANE, Judge, presiding.

Mr. S. D. PUTERBAUGH, for appellant; that the defendant's husband was incompetent to testify, it not appearing that in the matter in question he was acting as her agent; cited Trepp v. Baker, 78 Ill. 146; Reeves v. Herr, 59 Ill. 81.

Upon the right of a third party to bring an action upon a promise made to another for his benefit: Hind v. Holdship, 2 Watts, 104; Arnold v. Lyman, 17 Mass. 400; Hall v. Morton, 17 Mass. 575; Hinkley v. Fowler, 15 Me. 285; Carnegie v. Morrison, 2 Met. 381; Bristow v. Lane, 21 Ill. 194; Eddy v. Roberts, 17 Ill. 505; Brown v. Strait, 17 Ill. 88; Del. etc. Canal Co. v. Winchester Co. Bank, 4 Denio, 97; Farron v. Turner, 2 A. K. Marsh. 496.

That instructions must be based on the evidence: Goodwin v. Durham, 56 Ill. 239; Holden v. Hulburd, 61 Ill. 280; Paulin v. Howser, 63 Ill. 312.

Instructions must conform to the pleadings as well as the facts: Keightlinger v. Egan, 65 Ill. 235; Diversey v. Kellogg, 44 Ill. 114; Seckel v. Scott, 56 Ill. 106.

Mr. I. E. LAMBERT, for appellee; as to the competency of defendant's husband to testify as the agent of the defendant, cited Rev. Stat. 1874, 489.

Teessen v. Camblin.

SIBLEY, J. Uhtje Krefting brought his action in the Peoria Circuit Court against Elizabeth Camblin and Frederick Koozier, to recover for labor and materials furnished in the construction of a house upon Mrs. Camblin's land, about 1865; afterward the death of Krefting was suggested, and Richard Teessen, as administrator, substituted as plaintiff in place of the deceased, and the suit was dismissed as to the defendant Koozier. Mrs. Camblin filed plea of *non-assumpsit*, Statute of Limitations and notice of set-off. The notice of set-off was subsequently withdrawn and the cause proceeded to trial by a jury, upon issues formed upon these pleas, when a verdict was rendered for the defendant. Teessen appealed to this court, and assigns for error that the court below admitted improper testimony to go to the jury; gave improper instructions for the defendant, and refused to set aside the verdict and grant a new trial. The real question in the case was, whether there had been a new promise on the part of the appellee, sufficient to take the case out of the Statute of Limitations (it being conceded that the original cause of action accrued more than five years previous to the commencement of the suit.) The first evidence offered on the part of the plaintiff, on the trial in the Circuit Court, was a decree rendered by the Tazewell Circuit Court, March 1871, in a suit of divorce by Elizabeth Koozier (now Camblin), complainant, against Frederick Koozier, defendant, dissolving the bands of matrimony existing between them; also awarding to the complainant the possession of the lands and some personal property which she formerly owned, and after reciting that the complainant had "so stipulated in open court decreed, that she should pay to Grafton (who it seems was the same as Krefting) the amount due them upon the building of a house on said land." The decree was admitted against the defendant's objection. This evidence, if properly admitted (which we do not concede) failed entirely to establish a new promise on the part of appellee to pay Uhtje Krefting a debt barred by the Statute of Limitations, Krefting being a stranger to the record, and from anything that appears to the contrary, wholly unacquainted with the proceedings in that case. It was no promise to him, nor to any one acting on

his behalf. This was necessary to prevent the bar of the statute. The court says in *Keener v. Crull and wife*, 19 Ill. 189, "the promise must be made to the party seeking its benefit, or to some one authorized to act for them. A promise to a stranger is insufficient to establish a promise to the plaintiff or the party whom he represents: *Kyle v. Wells*, 17 Pa. St. 12, 236; *Braidsford v. James*, 3 Strob. 12, 171; *Martin v. Brooch*, 6 Ga. 12, 21.

This doctrine is recognized and approved in *Norton v. Colby*, 52 Ill. 198, and again in *Carroll et al. v. Forsyth*, 69 Ill. 127; *Wachter v. Albee*, 80 Ill. 47; *McGrew et al., ex'rs. v. Forsyth*, 80 Ill. 596.

The authorities referred to by the counsel for appellant on this branch of the case are not in point. They were suits brought upon original undertakings by a third party to pay for the benefit of the creditor the debt of the debtor, while the promise in the decree read in evidence, if a promise at all, was made by the appellee to the party of record in that case to extinguish a liability then existing between her and a stranger to it.

The other evidence in the case to establish a new promise is contained in the testimony of the witness Daniel R. Sheen (who was afterward employed as attorney in the case), and Richard Teessen, the appellant, who, in April, 1877, called on appellee for the purpose of collecting this bill. The former says the items of the bill were read over to her, and that she at first refused to pay it because she had no money; we then offered to give her time if she would give her note; she said that she could not write, and would not give her note to anybody, etc., etc.; she said that I might sue if I wanted to; that I could not scare her, and "if you sue the bill I will put in a bill for boarding his men." On his cross-examination he testified that she promised to pay the bill as soon as she could. The other witness testified to the conversation substantially as related by Sheen.

Leaving out of view the testimony of Mrs. Camblin, who swears positively that she never saw the bill, and never promised to pay it, is the evidence then, when taken altogether,

Teessen v. Camblin.

sufficient to establish an absolute and unconditional promise such as the law requires to take a case out of the statute? We think not. Notwithstanding a party may promise to pay a debt barred by the statute, still, if the promise is a conditional one, or the person promising it at the same time protesting against the payment of it, or that he has a set-off which ought to be deducted, such a promise is insufficient to take the case out of the statute. The promise to pay should be considered in connection with the refusal to pay, as well as the claim of set-off, and the whole admission taken together. It was said in *Kimnel v. Schwartz*, Breeze, 281, that the promise to pay must be absolute and unqualified, and is not to be extended by implication or presumption beyond the express words of the promise. See also *Bell v. Morrison*, 1 Pet, 360. In *Read v. Wilkinson*, 2 Wash. C. C. R. 517, the court remark: "But anything added going to negative a promise or acknowledgment must be considered as qualifying every other expression, and as the whole must be taken together, it amounts to a refusal to pay which can never be construed into a promise to pay." Besides, Angell, in his work on Limitations, 236, remarks, on good authority, that a promise to pay a debt, barred by the statute, when the promisor can or is able, is a conditional promise, and can not be enforced without proof of the means or ability to pay. This record is destitute of any such proof. Then does the evidence in this case, when considered in the light of the authorities, amount to an absolute and unconditional promise, such as is necessary to sustain the action? Clearly not, and the jury properly found for the defendant. They may, and doubtless did, conclude that whatever promise was made was casual, and wrung from an illiterate woman, in unguarded moments by two shrewd persons, one of them an attorney who did the principal part of talking. The error assigned respecting the admission of the testimony of Frederick Koozier (if an error at all, which may well be questioned, since he, although the husband of the appellee, when the indebtedness accrued, had at the time of the trial no interest whatever in the result of the suit), we do not deem it material to the merits of the case. The only portion of his testimony

that was against the appellant related to the set-off, and inasmuch as that was out of the case, it worked no injury to him. The first instruction given by the court for the defendant, as we have shown, stated the law correctly, and the same may be said of the second.

That a previous consideration must be proven to sustain an action upon a new promise founded on a debt barred by the Statute of Limitations is so well settled as to render the citation of authorities in support of it quite needless. The fourth instruction given for the defendant was concerning a matter not before the jury, and hence irregular. But, as the jury could not well come to any other conclusion than the one arrived at, the instruction was harmless, therefore being satisfied with the verdict, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

THE OTTAWA, OSWEGO AND FOX RIVER VALLEY R.
R. Co. use, etc.
v.
SAMUEL McMATH.

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1. EVIDENCE—CROSS-EXAMINATION—INTERESTED PARTY AS WITNESS.—Where the witness is a party in interest, greater latitude is allowed on cross-examination than to a person wholly free from interest. This, however, is greatly in the discretion of the judge who tried the case, to be exercised according to the circumstances in each particular case. It is proper, upon cross-examination to ask the witness in reference to his conduct in transactions similar to the one in suit, for the purpose (if for no other) of affording the jury the means of determining whether a person who had been engaged in many similar transactions, would be as likely to remember the particular facts relating to the contract in evidence, as another witness who had been connected with this one only.

2. PRACTICE—MOTION FOR NEW TRIAL—STATING POINTS IN WRITING.—The appellate court will take notice of nothing not specifically stated in the record, as a ground of exception; and where on motion for a new trial in the court below, no objection was urged that the damages were excessive, as

O. O. & F. R. V. R. R. Co. v. McMath.

ground for setting aside the verdict, the court below had the right to suppose that appellant acquiesced in the amount of the finding, and relied alone on the grounds specified for a new trial, and this court can not now consider it, when made for the first time in this court.

APPEAL from the Circuit Court of LaSalle county; the Hon. EDWIN S. LELAND, Judge, presiding.

Mr. EDWIN N. LEWIS, for appellant; that judgments on contracts identical with the one in suit had been sustained, cited O. O. and F. R. V. R. R. Co. v. Hays, 61 Ill. 422.

That appellee cannot plead ignorance of the law as an excuse: Parsons on Con. 398; Shafer v. Davis, 13 Ill. 395; Campbell v. Carter, 14 Ill. 286; Gordere v. Downing, 18 Ill. 492; Wood v. Price, 46 Ill., 435.

That a contract made by an unauthorized agent must be disaffirmed within a reasonable time: Saveland v. Green, 40 Wis. 16 Am. Law Reg. 183.

Mere acquiescence amounts to a ratification: Williams v. Merritt, 23 Ill. 623; Francis v. Kirker, Ill. Sup. Ct. June 22, 1877.

Mr. D. P. JONES, for appellee; contended that the conduct and representations of appellee do not amount to an affirmance of an agency, and do not estop him from insisting there was no agency, cited The People v. Brown et al., 62 Ill. 436; Preble v. Conger, 66 Ill. 370; Hefner v. Vandolah, 62 Ill., 483; Bigelow on Estoppel 441.

That representations made under ignorance or mistake of the law do not estop: Bigelow on Estoppel 450; Wilcox v. Howell, 44 N. Y. 401; Charlestown v. Co. Com'rs, 109 Mass. 270.

That if the element of fraud or injury is wanting, there can be no estoppel: Flower et al. v. Elwood, 66 Ill. 438; Davidson v. Young, 38 Ill. 146; Smith v. Newton, 38 Ill. 230.

SIBLEY, J. This action was brought by the Ottawa, Oswego and Fox River Valley Railroad Co., for the use of Joseph Jackson v. Samuel McMath, on a contract purporting to be

executed by him and his co-partner, Volutfield, to pay the said railroad company \$1,000 when the iron was laid on the road-bed from Wenona, in Marshall county, to within one-half a mile of Milford, in certain installments, and to receive in consideration thereof an equal amount of the capital stock of the railroad company. There were three special counts in the declaration declaring upon the contract, and a plea of the general issue filed by the defendant, sworn to, denying the execution of the instrument sued on. The trial before the court and jury resulted in a verdict for the defendant. A motion was made for a new trial and overruled by the court. No reasons were filed with the motion specifying the grounds for it. The plaintiff appealed to this court, and has assigned several errors for reversing the judgment; the first two of which are substantially the same, and are pointed out in his brief. First, that the court below erred in permitting the witness Jackson, on his cross-examination, to answer whether the Vermilion Coal Company built that portion of the railroad lying between Streator and Wenona. He having testified, on his examination in chief, that the road was built in January, 1871, from and to the points mentioned in the contract, it would seem to be pertinent to allow him, on the cross-examination, to answer who built it, when and how it was constructed. There could be no objection, on cross-examination, to the inquiry of how many notes and how much he had collected upon transactions similar to the one in dispute, for the purpose (if nothing else) of affording the jury the means of determining whether a person who had been engaged in many transactions of this nature would be as likely to remember the particular facts relating to the execution of the contract in evidence, as the other witness who had been connected with this one only. The question that he was permitted to answer, as to whether the road was owned and constructed by the O., O. & F. R. V. R. R. Co., may not have been quite so pertinent to the issue. But the witness was the party in interest, and in such and like cases greater latitude is allowed on cross-examination than to a person wholly free from feeling or interest. This, however, is a matter greatly in the discretion of the judge who tried the

O. O. & F. R. V. R. R. Co. v. McMath.

case (1 Greenl. 450), to be exercised by him according to the circumstances in each particular case, and we can not see wherein this discretion has been abused, or how the rights of the appellant have been prejudiced by the admission of the testimony. Nor do we see any serious objection in allowing the witness when recalled to state on his re-examination the reasons that induced him to make a proposition of settlement, if, as is indicated, a settlement had been the subject of a conversation.

There being no error assigned on the record for the action of the court in giving or refusing instructions to the jury, the only remaining question to be considered is, whether the court erred in overruling the appellant's motion for a new trial.

In Ch. 110, Sec. 57 of the Rev. Laws of 1874, will be found the following words: "If either party may wish to except to the verdict, or for other causes to move for a new trial, or in arrest of judgment, he *shall*, before final judgment be entered, or during the term it is entered, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment shall thereupon be stayed until such motion can be heard by the court."

It is obvious that this provision of the statute was intended to require the party that made the motion to direct the attention of the court to the specific reasons for granting a new trial. If, as now insisted by counsel, that the verdict of the jury was against the law and the evidence, and the attention of the court had been called to that specific objection, it would doubtless have sustained the motion. How could the court know, under that general request, whether the causes for it were misconduct or error of the jury, newly discovered evidence, or various other reasons that may be assigned for a new trial, was the subject of the complaint?

Previous to the act of 1872, the person moving for a new trial was only required to give the opposite party the points in writing, particularly specifying the grounds for such motion. This change in the law would appear to indicate that something further was necessary to be done before the party making the motion would be in a condition to urge his objections to the verdict, and that was to file the points particularly specifying

the grounds to be relied on. If this is not done, the court might very properly treat the motion as waived. Aside from any such statute as this, it was ruled in *Taylor v. Geger*, Hardin, 586; *Reed v. Mullen*, 1 Bibb. 142; *Goldsbury v. May*, 1 Litt. 254; *Brown, Ex. v. Swan*, 1 Mass. 202, that the grounds for the application for a new trial should be filed with the motion in order to give the opposite party an opportunity to meet them, and none other ought to be considered by the court. So in *Emory v. Addis*, 71 Ill. 274, and *Jones v. Jones*, Ib. 562. In the latter case it is said: "On the motion for new trial in the court below, there was no objection urged that the damages were excessive. That was not stated as a ground for setting aside the verdict. The court below not being asked to do so, had the right to suppose that appellant acquiesced in the amount of the finding, but relied on the grounds specified alone for a new trial."

That an appellate court will take notice of nothing not specifically stated in the record, as a ground of exceptions, seems to be well settled. In *Whiteside v. Jackson*, 1 Wend. 419, the court states the rule to be well settled that on a bill of exceptions the party excepting is confined to the points excepted to, *Dean v. Gridley*, 10 Wend. 254; *Pechett v. Allen*, 10 Conn. 141; *Hide v. Langworth*, 11 Wheat. 199; *Neusum v. Neusum*, 1 Leigh, 86; *Cox v. Field*, 1 Green, 215. No points having been filed in the court below with the motion for a new trial, as required by the statute, we cannot now consider them when for the first time they are made in this court, for, in the language of Mr. Justice Walker, in *Jones v. Jones*, the appellant is deemed to have acquiesced in the finding of the jury; therefore the judgment of the Circuit Court is affirmed.

Judgment affirmed.

LELAND, P. J., took no part in the decision of this case.

Vanderslice v. Mumma.

AUGUSTUS M. VANDERSLICE

V.

SOLOMON H. MUMMA.

1. **RIGHT OF TENANT TO HARVEST CROP — CONFLICT IN TESTIMONY — VERDICT.**—There was a conflict of testimony as to the right to harvest and thresh the crop, appellant claiming that if appellee left the farm, then appellant might harvest and thresh the grain, and pay appellee for his labor; appellee on the contrary denying any such arrangement. This was for the jury to determine from the evidence, and they having found against the right as claimed by appellant, the verdict will not be disturbed.

2. **TRESPASS — MEASURE OF DAMAGES.**—It is not important, then, whether the relation between the parties in respect to the crop was that of landlord and tenant or tenants in common; appellee, if right in his view of it, was to have control of the grain till he harvested, threshed and delivered one-half to appellant, and if the latter wrongfully harvested the grain against the will of the former, and appropriated it all to his exclusive use, he became a trespasser, and appellee would be entitled to recover one-half the value of it when severed.

3. **ERRONEOUS INSTRUCTION AS TO MEASURE OF DAMAGES.**—It may be that the court erred in its instruction as to the measure of damages, but where, notwithstanding the instruction, it appears that the amount allowed by the jury was no more than appellee was entitled under the evidence to recover, the case will not be reversed on account of error in the instruction.

4. **INSTRUCTIONS MUST BE BASED ON EVIDENCE.**—There being no evidence tending to show that appellee, having the right, had voluntarily abandoned it and neglected to cut the rye, though it was his right and duty to harvest it, an instruction asked by appellant, based upon an assumed abandonment of the crop, and the right of appellant to save it because of the abandonment and neglect of appellee, was properly refused.

APPEAL from the Circuit Court of Putnam county; the Hon. JOHN BURNS, Judge, presiding.

Mr. W. H. CASSON and Mr. F. S. POTTER, for appellant; argued that the parties were tenants in common of the crop, and cited *Alwood v. Ruckman*, 21 Ill. 200; *Creel v. Kirkham*, 47 Ill. 344; *Warner v. Hoisington*, 42 Vt. 94; *Appling v. Odorn*, 46 Ga. 583.

That it was appellant's duty to take care of the crop, and for the expense therefor he had an equitable lien upon it, and a

Vanderslice v. Mumma.

right of action against his co-tenant: *Haven v. Mehlgarten*, 19 Ill. 91; *Bates v. Courtright*, 36 Ill. 518; *Tripp v. Grouner*, 60 Ill. 474; *Dyckman v. Valentine*, 42 N. Y. 561.

That appellant was entitled to set-off or re-coup his just charges against appellee's portion of the crop: *Davis v. Brown*, 34 N. H. 454; *Titsworth v. Stout*, 49 Ill. 78; *Hall v. Piddoch*, 21 N. J. Eq. 311; 2 *Hillard on Torts*, 135.

The possession of appellant being lawful, he is not liable for a conversion until after a demand and refusal: *Bruner v. Dyball*, 42 Ill. 34. *Williams v. Bemis*, 108 Mass. 91.

As to the lien of a landlord for labor in gathering crops of the tenant, and for rent: *Secrist v. Stevens*, 35 Iowa, 580; *Rev. Stat. 1874, Chap. 80, §§ 31, 33*.

The verdict was unwarranted by the evidence: *Koester v. Esslinger*, 44 Ill. 477; *Haycroft v. Davis*, 49 Ill. 455; *Chase v. McDonell et al.*, 24 Ill. 236.

As to measure of damages: *Taylor v. Bradley*, 4 Abb. N. Y.

Messrs. BANGS, SHAW and EDWARDS, and Mr. FRANK WHITING, for appellee.

LELAND, P. J. This was an action commenced by appellee before a justice of the peace of Putnam county, against appellant, in September, 1877. The summons was in the usual form. On the trial, however, before the justice, the plaintiff claimed, according to the transcript, \$200 for trespass, and the defendant plead not guilty. On the trial in the Circuit Court in October last, the case was considered one in trespass, and the court, at the request of the appellant, instructed the jury that appellee could not recover for his labor, but would have to seek his remedy in some other form of action.

The appellant was the owner of land, and the appellee had occupied a portion of it as tenant during the year 1874. On the portion not occupied by the tenant, appellant had, in the fall of 1874, done some plowing, and had commenced to sow it with rye. The land intended for rye was about thirty-five acres. This arrangement was thereupon made: It was agreed that appellee should complete the plowing and sowing of the

Vanderslice v. Mumma.

thirty-five acres; should harvest and thresh the grain and deliver one-half to appellant in his granary, and retain one-half for himself; appellant was to furnish a hand to help harvest. So far the parties agree. Appellant, however, contends that it was agreed that if appellee did not remain on the farm appellant was to have the rye and pay appellee for his work and labor. Appellee, in the winter next after the sowing, moved into a house of his own in Granville, not far from the land.

The only real point in controversy was, whether appellee or appellant had the right to harvest and thresh the rye. Appellant claimed that the arrangement was that if appellee left the farm, appellant might harvest and thresh the grain and pay appellee for his labor, and that appellee had acquiesced in such arrangement. Appellant harvested and threshed the rye, claiming the right to do so. Appellee denied that there was any such arrangement that he might do it. It is clear that appellant claimed to harvest and thresh the rye because he had the right to, for the reason aforesaid.

There is nothing tending to show that appellee having the right had voluntarily abandoned it and neglected to cut the rye, though it was his right and duty to harvest it. Appellee claimed that he intended to harvest it, and that appellant wrongfully did it without giving him an opportunity. The gist of the controversy therefore being, which one had the right to harvest it under the agreement of the parties, the instructions asked for by appellant, and refused, on the subject of abandonment of the rye and the right of appellant to save it because of the abandonment and neglect of appellee, were properly refused, as unnecessary and perhaps irrelevant. The fifth instruction given on the part of appellant was all that was necessary. This was to the effect that if in case appellee left the farm, appellant was to own and harvest the crop and pay appellee for his labor, appellee could not recover anything in this action. There may be error in that part of the instruction which states, as to the claim of the appellee for labor, that he would have to seek his remedy in some other form of action, but this, if so, was an error to the prejudice of the appellee. The third refused instruction of appellant, is merely to the effect that,

Vanderslice v. Mumma.

by the original arrangement, the relation of the parties was not necessarily that of landlord and tenant. We do not think it important whether this was so, or whether the relation was that of tenants in common, as contended for by appellant, under the authority of the case of *Alwood v. Ruckman*, 21 Ill. 200. By it, by whatever name called, appellee, if right in his view of it, was to have the control of the grain till he harvested, threshed and delivered one-half to appellant, and if the latter wrongfully harvested the grain against the will of the former, and appropriated it all to his exclusive use, he would be a trespasser, and appellee would be entitled to recover one-half the value of it when severed. It is said that it depends on the intention as to whether the relation is that of landlord and tenant, or tenants in common, in cases like the present one. It might perhaps appear to appellant's counsel that the former relation was intended, if it was desired to distrain under Sec. 29 of Chap. 80, Rev. Stat., for rent due payable in products, if appellee, after threshing, should appropriate what is usually called the landlord's share to his own use. If the relation was that of tenants in common, trespass or trover might be maintained for the appropriation by appellant, of the rye to his exclusive use against the will of appellee. Rev. Stat. Ch. 76, and the decisions of the Supreme Court under it in the 13 and 38 Ill., and elsewhere. It may be that the measure of damages, as laid down by the court below, was wrong in an action of trespass. The Court instructed that it was the full value of the rye when threshed, deducting the landlord's share, allowing him nothing for the expense of harvesting and threshing. The rule in trespass would seem to be the value of the rye with the straw immediately after it was severed from the land: *Robertson v. Jones et al.* 71 Ill. 405. If the threshed rye had been demanded and appellant had refused to deliver, the measure would be as laid down below. So perhaps if sold and converted into money, the tort could be waived and the money recovered. Notwithstanding the instruction, however, and it may be because of the limit of the jurisdiction of the justice to \$200, the jury have not allowed more than what the value of the rye was when severed from the land; we think, according

Vanderslice v. Mumma.

to the decided weight of the evidence, less than it was proved to be worth when severed. We do not deem it necessary to recapitulate it all. Appellee says the half was worth \$300 threshed, \$200 standing. Jacobs says that there were 780 bushels when threshed, that it was then worth 75 cents a bushel. Jacobs says appellant told him he got 75 cents for the first lot sold, and appellant, though a witness, says nothing on the subject. Livingstone says 55 or 60 cents. Take any reasonable view of the evidence, and the jury came to the limit of jurisdiction at \$200 before they had allowed all the actual damages under the rule of the value of the rye with the straw when severed from the land. As the trial in the circuit court was *de novo*, appellee could, we think, recover whatever the evidence entitled him to, without regard to the form of action. *Thompson v. Sutton*, 51 Ill., 213. But it is not necessary to determine this in this case. It does not matter whether the relation was that of landlord and tenant or tenants in common. The appellee was clearly entitled to recover what one-half the rye was worth when severed, if the appellee and not the appellant had the right to harvest and thresh it; and if appellant wrongfully prevented him from so doing, and appropriated the whole of it to his own use, to the exclusion of appellee, this must have been so found by the jury, or they could not have otherwise found for appellee under the ruling of the court below, and this was the only real controversy in the case. We can not say the verdict was against the weight of the evidence, and distrust it for that reason. Whether appellant or appellee had the right to harvest and thresh the crop was the question before the jury. They have decided it in favor of appellee, and that must terminate the matter, even though the jury may not have arrived at the right conclusion. Though there may have been some erroneous rulings below, they are not of a character requiring that the judgment should be reversed, and the case tried again.

Judgment affirmed.

Orr v. Jason.

MARY ORR

v.

MAGDALENA JASON, Adm'x, etc.

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1. EVIDENCE—PROMPTNESS IN PAYMENT OF DEBTS.—In a suit for the payment of an alleged debt, evidence that a party was prompt in the payment of his debts is admissible. It is always allowable to show the necessity of the creditor, and the ability of the debtor as circumstances tending to show payment, and promptness in payment is as proper to be shown as ability.

2. ADMISSION OF EVIDENCE RELATIVE TO OTHER PROCEEDINGS IN COURT.—Under the circumstances of this case, it was not error to admit evidence of proceedings to probate a will wherein the subject matter in this suit was in question, it being a circumstance tending to shed light upon the intention of appellant and of the deceased, as to whether there was a liquidation of the claim at \$3,000, and a promise to pay.

3. OBJECTION TO QUESTION AS BEING TOO GENERAL.—The general question "just state what the arrangement between you and your father was," is too broad, as an answer, if permitted, would have allowed the witness to have testified fully in relation to conversations or transactions about which the other interested witness had not spoken. It was the duty of counsel to have called the attention of the witness to the particular transaction or conversation mentioned by such other interested witness.

4. INSTRUCTIONS.—MODIFICATIONS BY THE COURT.—A modification by the court of an instruction which has the effect to mislead the jury, is a substantial error for which the cause will be reversed.

APPEAL from the Circuit Court of Marshall county; the Hon. JOHN BURNS, Judge, presiding.

Messrs. BARNES & MUIR, for appellant; contending that the court erred in admitting testimony relative to the general character of the deceased as a person who paid his debts promptly, cited Phillips on Ev. 563; 1 Greenl'f Ev. § 52; Crose v. Rutledge, 81 Ill. 266; Phillips on Ev. 624.

That it was error to instruct that the plaintiff must prove his case by a clear preponderance of evidence: Crabtree v. Reed, 50 Ill. 206.

The law in civil cases requires only a preponderance of evidence: Miller v. Balthasser, 78 Ill. 302; Miller v. Miller, 16 Ill. 296; Freeman et al. v. Freeman, 65 Ill. 106.

Orr v. Jason.

Declarations and admissions of parties, when deliberately made, in view of all the facts to which they relate, are of the most satisfactory character as evidence, and it is error for the court to instruct that such evidence should be received with great caution and allowance: *Frizzell v. Cole*, 29 Ill. 465; *Straubher et al. v. Mohler*, 80 Ill. 21; *Rafferty v. The People*, 72 Ill. 37.

Instructions should not be given upon any theory not supported by the evidence: *Badger. v. Paper Mf'g Co. et al.* 70 Ill. 302.

That the law under certain circumstances implies a contract to pay for services rendered by a child: *Freeman et al. v. Freeman*, 63 Ill. 106; *Miller v. Miller*, 16 Ill. 296; *McRea v. McRea*, 3 Brad. (N. Y.) 199.

The eighth instruction given for appellee was wrong, as it gives too much prominence to the circumstances favorable to appellee, and makes no mention of facts supporting appellant's view of the case: *Hewitt v. Johnson*, 72 Ill. 513; *Homes v. Hale*, 71 Ill. 552; *Hatch et al. v. Marsh*, 71 Ill. 370; *C. B. & R. R. Co. v. Griffin*, 68 Ill. 499.

Upon the question of when the Statute of Limitation begins to run in such cases: *Rev. Stat.* 1874 676; *Freeman et al. v. Freeman*, 65 Ill. 106; *Thompson v. Reid, adm'r*, 48 Ill. 118.

Messrs. BANGS, SHAW & EDWARDS, for appellee; argued that evidence that a party was prompt in payment of his debts, is admissible as tending to raise a presumption of payment of the claim in suit; and cited 3 Phillips on Ev. 505; *Ross v. Darby*, 4 Munf. 428. .

That the plaintiff should make out a case by a clear preponderance of testimony: *Candor's Appeal*, 5 Watts v. Serg., 513; *Mostelle's Appeal*, 30 Pa. St. 473; *Leidig v. Coover's Ex'rs*, 2 Wright, 534; *Davis v. Goodenow*, 1 Vt. 715; *Parker v. Johnson*, 25 Ga. 576; *Peak v. The People*, 76 Ill. 289; *Long v. Hitchcock*, 9 C. & P. 619; *Lanz v. Frey et ux.* 19 Penn. 369; 1 Starkie on Ev. 543.

It was proper for the jury to know that expectation of compensation by will would not take the place of an understanding

Orr v. Jason.

between appellant and her father that she was working for hire: *Willie v. Dunn, Wright*, 134; *Lee v. Lee*, 6 Gil. & Johns. 316.

LELAND, P. J. This was an action by Mary Orr, the wife of William T. Orr, against her mother, Magdalena Jason, as administratrix of the estate of her father, John Jason.

The suit was brought by appellant to recover \$3,000, claimed to have been an amount agreed upon and fixed as compensation for some twelve and a half years' labor by appellant for her father in his lifetime, after she became of age. The defense was that she continued with her father after she became of age as before, and that the relation of debtor and creditor never existed. There was also a plea that the cause of action did not accrue within five years next preceding the commencement of the suit: (This should have been five years next preceding the death, etc. See Sec. 19, p. 676, Rev. Stat., 1874.) Replications: first, that they did accrue, etc., and second, a promise by deceased within the five years, etc. Trial and verdict for the defendant.

Jason, the deceased, was a Dane, and there was evidence tending to show that the appellant during the twelve and a half years performed the ordinary farm labor usually done by men. It was contended by appellant, with evidence tending to show it, that it was constant, and by appellee, supported by evidence to that effect, that it was occasional only, and that it was not unusual for females similarly situated, of Danish descent, to do such work occasionally.

There was evidence tending to show that appellant's father during his last illness, said to her in the presence of witnesses whom he desired to pay particular attention, "Mary, I want you to have \$3,000 to pay you for your work out of my property, and then come in equal shares with the rest."

There was also evidence that an attempt had been made to prove this up as a nuncupative will, and that the question whether it was a will or not was then pending in the Circuit Court on appeal from a determination of the County Court that it was not a will. There was evidence to the effect that

Orr v. Jason.

the father was very low, and near his end when the statement was said to have been made. It was also contended by appellant, and there was evidence tending to show it, that her father a day or two after this gave her \$750 for her trouble nursing him during his sickness, and that it was not to be part payment of the \$3,000, but a gift or gratuity in addition thereto.

This is a sufficient statement of the controversy for the purposes of this opinion. We do not propose to say anything as to the weight of the evidence, as the case must be passed upon by another jury, but we will confine ourselves to the rulings of the Court below, which we deem erroneous.

The first error assigned to which our attention is directed, is that witnesses for appellee were allowed to state that the deceased was prompt in the payment of debts. We see no objection to this. It is always allowable to show the necessity of the creditor and the ability of the debtor as circumstances tending to show payment, and there was evidence in the case tending to show that the father had paid Mary for her labor. We see no reason why promptness is not as proper to be shown as ability. The authorities cited by appellee we think in point.

The only objection to the introduction of the supposed will is that the jury might fear that if the plaintiff got a verdict she might also claim the same amount again under the will; that it was irrelevant, etc. We hardly think that the jury would consider that the payment of the amount as a debt would not amount to a payment of the legacy. We are disposed to think that the introduction of the will and the proceedings to probate it, if such proceedings were with the consent of appellant, and we think there is evidence tending to show that she did consent thereto, was proper in determining whether the \$3,000 were in the nature of a gratuity or bequest of that amount as her share out of the estate, instead of in addition to it. The mother testifies that the deceased said that he intended that Mary should have \$3,000, if she (the mother) was willing, in either money or property, but that he did not say that she should have that and then come in equal shares with the rest. Considering the amount of the estate of the deceased, and that there were other children, this would seem full as just as that appellant should

have \$3,000, and not treat the \$750 as a payment to that extent, but have it added to it, and then divide equally with the rest. As a circumstance shedding light upon the intention of appellant and of the deceased, as to whether there was a liquidation at \$3,000 and a promise to pay it, we see no objection to this evidence. If there was actually a promise to pay \$3,000 as a sum agreed upon and liquidated between the parties, it would not make it any the less a promise, that the deceased made a will, that the debt so promised should be paid. If the paper was not a will, but a promise merely, then appellant might have asked the Court to instruct to that effect for her.

We think the general question to appellant, "Just state what the arrangement between you and your father was?" was too broad, as an answer to it, if permitted, would have allowed the appellant to have testified fully in relation to conversations or transactions about which the other interested witnesses had not spoken.

It was the duty of counsel to have called the attention of the witness to the particular transaction or conversation mentioned by such other interested witnesses.

We think that she might have been asked whether it was true as stated by the witness that she was to have a dollar a day when she worked in the field, and nothing when she worked in the house? Whether it was true or not, that her father treated her the same after as before she became of age? Whether it was true or not that her father always paid right up? Whether it was true or not that nothing was said as to how much she was to get until John became of age, &c., &c.

We are aware it is rather difficult sometimes to say what a transaction mentioned in the statute is. In the case of *Donlevy v. Montgomery*, 66 Ill. 227, it was thought by the Court below that when it was proved that Donlevy admitted a fact, that he might say that he did not make any such admission, and that he knew he did not, because the alleged admitted fact did not exist, but on the contrary it was otherwise, stating what the fact was. The ruling was considered improper, and that he should only have been permitted to deny that the conversation took place and stop there without stating the real facts,

Orr v. Jason.

as that made him a witness as to the whole controversy, and not as to the conversation. It might plausibly be said that the real "transaction" testified about in this case, was whether the father did liquidate the amount for the work, and promise to pay the \$3,000, and that the interested witnesses were testifying to facts and circumstances tending to show that this could not be so. We think each one of the facts and circumstances tending to prove the main thing is the "transaction," about which appellant might speak, and that her attention should have been called to each of these, and not to the conclusion they tended to prove. She was permitted to say, and did say, that her father never paid her for her work; that there was an agreement that he was to pay her; that there was no arrangement by which she was not to get pay for work done in the house; that he never said he did not owe her; that nothing was ever said about settling up, that she never had any controversy about settlement. She also testified fully as to the liquidation and promise to pay \$3,000. Indeed, she really did deny everything that the other interested witnesses said on the subject.

So far as the rulings as to the evidence are concerned, we discover no substantial error, but we think some of the instructions are so erroneous as to require a reversal and the submission of the question to another jury. There are errors to which we do not allude, as to some of the instructions. It is not necessary to examine them all critically. We do not consider it objectionable in a case like this that the jury should be instructed that the preponderance of the evidence should be *satisfactory* and the cases cited by appellee sustain the position assumed.

The modification of the 7th instruction asked by appellant was, we think, improper. The instruction as asked read as follows:

"If the jury believe from the evidence that John Jason, during his last sickness, promised to pay the plaintiff \$3,000 for services said to have been rendered, and plaintiff assented to said sum, then in law it can make no difference in its legal effect in this case that at the same time Jason may have or did

call the attention of other parties as witnesses to said promise, and repeated the same, if the evidence shows that he did so, in the form of a will, or request that the same should be paid out of his estate, and that the plaintiff may have taken steps to establish the same as an oral will, as the real question in this case, and on this point, is whether or not the said John Jason did promise to pay the said sum of \$3,000 in consideration and as a compensation for the services rendered by her."

This instruction was a clear and accurate statement of the law, and it should have been given unchanged. The Court, however, so changed it as to render it less clear, and also made it inaccurate as a legal proposition by inserting between the words "did so" and "in the," the expression, "*and did not intend to make a devise or bequest,*" and also after the words "oral will" this expression, "*and if in fact he did not intend his declaration as a will.*" This was calculated to create the impression with the jury that although there might be a distinct promise to pay the \$3,000 for the labor, the plaintiff could not recover if the deceased at the same time intended to direct by said last will and testament that the debt so promised should be paid out of his estate, or in other words, that as there was offered in evidence what purported to be a nuncupative will, if the jury thought it really was a will, then the plaintiff could not recover on the promise to pay the \$3,000, though it was clearly proved.

The plaintiff was entitled to the instruction as asked, and if the only effect of the modification was to mislead the jury, it was a substantial error to change it.

The qualification to appellant's 8th instruction should not have been made. The substance of the change was this: The instruction stated among other things that if the deceased said that plaintiff was to have \$3,000, and asked plaintiff if she was satisfied, and she said she was, the estate would be liable, etc., the Court added the words, applying them to appellant, "and accepted said promise and agreed to take said sum as payment." The instruction was accurate as asked, and the amendment was calculated to impress the jury with the idea that a mere statement by appellant that she was satisfied was not sufficient; that

Orr v. Jason.

is, that she should also have added that she accepted the promise and agreed to take the \$3,000 as payment.

The 9th, which was on the subject of the promise to pay the \$3,000 and as to whether it was a gratuity, or a promise to take the indebtedness out of the Statute of Limitations, was modified by the Court, by adding these words at the end of it: If you believe from the evidence the deceased owed the plaintiff what he promised to pay, or any part thereof, in such case the jury should find what is due plaintiff, if anything, from all the evidence as laid down in these instructions. The language is not entirely clear. It seems to us that the idea intended was that though you may believe the promise was for \$3,000, you should not find that amount, but should find from all the evidence according to the principles of the instruction taken as a whole, what was due, as though there were no promise to pay \$3,000; that is, that the promise to pay \$3,000 would only include what was actually due, if less than that in the judgment of the jury from all the evidence before them.

It may perhaps be said that if this qualification was wrong it did no harm on the trial below, if it might on another, because the jury did not find anything for plaintiff, and therefore there was no lessening of the \$3,000 to a smaller sum, as they were directed they might do. The instruction was wrong as to the facts in this case, because there never had been, according to the evidence, any adjustment or liquidation of an amount and the promise of \$3,000, if made, was both a liquidation and promise to pay for an unliquidated claim for twelve and a half years' work. If it was meant to say \$3,000, less payments, if any, it should have been clearly so stated.

Exception is taken by appellant to the giving the first instruction for the appellee, as well as to others. We will only consider the first, as we deem that it is clearly defective. It would extend this opinion to too great length to examine all the objections to instructions, and state whether they are well or ill founded.

If the objections made are important, appellee's counsel will guard against the errors on another trial.

The first instruction given for appellee is as follows:

“The jury should consider with care and caution any casual conversation, if any, not had in relation to the matter in dispute, and tending to adjust or determine the rights of the parties in relation to the matters under consideration in this case; such conversations as were had, if any, with third persons having nothing to do with fixing or adjusting the rights of the parties as to the matters in controversy.”

The criticism of the appellant's counsel as to this instruction being obscure and not sensible, is well enough. To those conversant with the mistakes incident to the hurry of trials in the Circuit Court, it is apparent that the word “not” has been omitted, between the words “and” and “tending.” The word may have been in the mind and not placed on paper by the writer, or the writer may have thought the “not” before the word “had” should be applied to the “tending.” Jurors, however, would hardly know what was meant. Treating the negative as applicable to the “tending,” etc., we think the giving the instruction was clearly erroneous, and so much so as to entitle appellant to a reversal in this cause, although we might imagine a state of the case where there could properly be an affirmance, notwithstanding the giving it. The all-important thing for appellant to establish was whether her father promised to pay her the \$3,000 for her services. The evidence as to this consisted in that of those who were present when it was made. They say the father did make the promise, and called upon them as witnesses to remember it. The appellee herself says there was talk by her husband on the subject. She understood him, however, that the \$3,000 was to be all appellant was to have out of the estate. The witnesses at whom this instruction was aimed were Philip Martin and Martin Degner. It was their evidence that was to be considered with care and caution. It was their evidence which the Court declared was that of persons listening to casual conversations. It was the declaration of the deceased John Jason to them which the Court actually decided to be casual, instead of leaving it to the jury to determine whether it was so or not. What was this evidence?

Martin says: I heard Jesse Bane ask Jason if he had some

Pilgrim v. Mellor.

money to loan and if he could let him have some. Jason said he would not, that he owed Mary \$3,000 and wanted to pay her. Witness also stated that in another conversation with Jason at another time, on Mr. Orr's farm, Jason, speaking of an adjoining eighty acres, said, Orr ought to buy it. I owe his wife \$3,000 and could pay for it.

Degner says he heard the talk with Bane; Bane wanted to borrow money. Jason said he could not let him have it; that he owed Mary \$3,000, and wanted to pay it; that she had worked like a man for twelve and a half years; that he owed her \$3,000, and must pay her off. He also says that they conversed in German after the others left about Jason's affairs generally, and that Jason repeated the statement about the \$3,000. Bane said, it is true, that he did not recollect about the \$3,000, and that he thought he would, if such conversation had taken place.

The cases cited by appellant from our own reports, are such as to require us to reverse for the giving the appellee's first instruction. They are in point, and not only binding as authority, but they properly define the duties and powers of judges and jurors.

Frizzell v. Cole, 29 Ill. 465; Rafferty v. The People, etc. 72 Ill. 37; Straubher et al. v. Mohler, 80 Ill. 21.

For the foregoing, and other reasons which might be given, we think the judgment should be reversed, and the cause submitted to another jury.

Reversed and remanded.

CROFT PILGRIM

v.

THOMAS MELLOR.

VENUE IN LOCAL ACTIONS—WHEN PLAINTIFF MAY ELECT TO SUE IN EITHER COUNTY.—Where an injury has been caused by an act done in one county to land situated in another, the venue may be laid in either, and a justice of the peace of the county where the parties reside may take jurisdiction of an action for damages to real property, although the injury occurred in an adjoining county.

Pilgrim v. Mellor.

APPEAL from the Circuit Court of Stark county; the Hon. JOSEPH W. COCHRANE, Judge, presiding.

Mr. MILES A. FULLER, for appellant ; argued that where an act in one county occasions damage to land in another county, an action for such injury may be brought in either county, and cited 1 Chitty's Pl. 269; Gould's Pl. Chap. 3, § 108; Bulwer's case, 7 Coke. 60; Bac. Ab. Actions A. 81; Mayor, etc. v. Cole, 7 T. R. 584; Comyn's Dig. Actions N. 3; Borden v. Crocker, 10 Pick. 383; 2 Taunt. 252; 2 T. Rep. 241; 14 English Rep. (Moak's) 641, note; Com. v. Lyons, Pa. Law Jour. 167; 2 Whar. Crim. Law, § 1812; Story on Conflict of Laws, § 539; Eachus v. Trustees, etc. 17 Ill. 535.

That the distinction between local and transitory actions has been abolished: Rev. Stat. 1874 775; Genin v. Grier, 10 Ohio 209.

Mr. C. K. LADD, for appellee ; that the action is local and must be brought in the county where the estate lies, and that the justice had no jurisdiction: cited Rev. Stat. 1874, 269; Cor. of New York v. Dawson, 2 John. Cas. 335; Stevenson v. Lombard, 2 East, 579; Barker v. Damer, 3 Mod. 338; Wey v. Yally, 6 Mod. 194; Bord v. Cudmore, Cro. Car. 183; 1 Chitty's Pl. 271; Selwyn's Nisi Prius, 1,253; Stephen's Nisi Prius, 2,639; Watt's, Adm'r, v. Kinney, 23 Wend. 485; Eachus v. Trustees, etc., 17 Ill. 535; Mott v. Coddington, 1 Robt. 267; Watts, Adm'r, v. Kinney, 6 Hill, 82; The Company. etc., v. Douglas, 2 East, 502; Daulson v. Matthews et al. 4 T. 503; Thompson v. Crocker, 9 Pick. 59; Worster v. Winnepiseogee Lake Co. 5 Foster, 525; Livingston v. Jefferson, Brock. 203.

Mr. B. F. THOMPSON, for appellee; that a justice's jurisdiction is prescribed by the statute, cited Rev. Stat. 1874, 639.

That the action is local and the venue must be laid in the county where the injury arose; 1 Chitty's Pl. 268; Stephen on Pl. 274; Gould's Pl. 105; 2 Bouv. Law. Dic. 79; 2 Kent's Com. 602; Story's Conflict of Laws, § 554; 2 Bouv. Law Dic.

Pilgrim v. Mellor.

634; 2 Waterman on Trespass, 446; Mersey, etc., Nav. Co. v. Douglass, 2 East, 497; Harmer v. Raymond, 5 Taunt. 789; 1 Hilliard on Torts, 659; Loeb v. Mathias, 37 Ind. 306; Thompson v. Crocker et al. 9 Pick. 59; Worster v. Winnepiseogee Lake Co., 5 Foster, 525; Eachus v. Trustees, etc., 17 Ill. 535; Tyler. on Eject. 382; Minkhart, etc., v. Hankler, 19 Ill. 47; Reed v. P. & O. R. R. Co., 18 Ill. 403; Sturman v. Colon, 48 Ill. 463; Livingston v. Jefferson, 1 Brock. 203; Whitaker v. Forbes, 15 Eng. R. 234.

SIBLEY, J. The only question to be determined in this case is whether the justice of the peace in Stark county had any authority to try the cause. Suit having been commenced before a justice in that county by Croft Pilgrim against Thomas Mellor, where both parties resided, to recover for an injury done by the defendant in erecting a dam upon his own premises, situated in the county of Stark, that so obstructed the natural flow of the water as to produce an injury to the adjoining land of the plaintiff, lying in Bureau county. The cause was removed to the Circuit Court of Stark county and there dismissed for want of jurisdiction in the justice to try the case.

An appeal was taken from that ruling to this Court, and is here assigned for error.

That the action is local in its nature, and as a general rule in such cases, suit must be brought in the county where the land is situated, are propositions which admit of very little dispute.

But it is insisted by appellant that cases like the present one form an exception to the general rule. That is, where an act is done in one county which produces an injurious effect in another, the remedy may be enforced in either. We have been referred to a number of authorities in support of that position. not many of them though are directly in point. The books indeed are quite barren of decided cases upon the precise question. It is true that most of the elementary writers concur in stating the law as settled in favor of the position assumed by appellant. 1 Chitty Pl. 269; 3 Black. Com. 294 and note; 4 Comyn's

Pilgrim v. Mellor.

Dig., Art. N. 11,167; Com. Dig. 250-251; Gould's Pl. 108.

This doctrine originated chiefly from the decision in Bulwer's case, 7 Coke, 63, although reference is there made to the ruling in the year books in the Abbot of Stratsford's case, where a similar question arose. The principle, however, in the former case is stated in broad and general terms that, "in all cases where the action is founded upon two things, done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, then the plaintiff may choose to bring his action in which of the counties he will."

This view of the law was sanctioned in the Mayor of London v. Cole, 7 Term. R. 583, where Lawrence, Judge, says, that "the rule in Bulwer's case gives a decisive answer to the application; it shows that where several material facts arise in different counties, the plaintiff may bring his action in either."

In Oliphant v. Smith, 3 Penn. 180, it is said "that every action founded upon a local cause shall be brought in the county where the cause of action arises. * * * The only exception to this rule is the erection of a nuisance in one county to the injury of lands in another. There the action may be brought in either," and reference is made to Bac. Ab. 56, 57 and 58; Com. Dig. 250-251. So in Bordon v. Crocker, 10 Pick 383, the rule in Bulwer's case is indorsed in the following emphatic language by the court:

"The plaintiff may unquestionably maintain his action in either county, in Bristol where the obstruction was raised, as well as in Plymouth where the injury was sustained. The law to be collected from Bulwer's case is decisive upon this point. Where one matter in one county is depending upon the matter in another county, the plaintiff may choose in which county he will bring his action."

Angell on Watercourses, 420, states the law to be, "where an injury has been caused, by an act done in one county, to land, etc., situate in another, the venue may be laid in either. The law to be collected from Bulwer's case is decisive upon this point. When one matter in one county is depending upon the

Pilgrim v. Mellor.

matter in another county, the plaintiff may choose in which county he shall bring his action."

A single case has been referred to, and, doubtless, the only one that can be found by appellee, where the point has been expressly decided against the ruling in Bulwer's case.

In Warren v. Webb, 1 Taunt. 279, referred to, a nuisance had been created in the county of Surrey, by the defendants permitting the water from his eaves-trough to escape through the plaintiff's wall, in that county, and suit was brought in Middlesex, where Lord Mansfield held it could not be maintained; also in Murray and Irwell Nav'n Co. v. Douglas, 2 East, 502; nothing was there decided except that the particular place in the county need not be correctly averred in the declaration; no reference was made to this exception to the rule in local actions. Nor is the case of Thompson v. Crocker, 9 Pick. 59, to the point, for, in that case, the action was commenced in the county of Plymouth, where the injury was sustained, and it was held that the suit was properly brought. What was said about that being the only place to bring the action, was mere *dictum*, and afterwards overruled in Borden v. Crocker.

The case of Eachus v. Trustees of Ill. and Mich. Canal, 17 Ill. 534; and many other cases of that character were decided upon quite a different principle. There the land injured, was situated in a foreign jurisdiction, and for that reason alone, the courts refused to entertain the action. Angell, in his treatise on Watercourses, § 421, remarks that it is hardly necessary to point out the difference there is, as regards actions and suits between the relation of *Counties* in the same State, and the relation between two distinct and independent States.

The case alluded to where the exception to the rule in local actions of a character like one before us was repudiated, is that of Worster v. Winnepisoegee Lake Co. 5 Foster, 526. There it was held that the action could be maintained, only in the county where the land was situated that sustained the injury. The authorities are reviewed in a very able opinion, delivered by Chief Justice Gilchrest, and the conclusion arrived at was that the rule established in Bulwer's case and

Pilgrim v. Mellor.

subsequently recognized and adopted by the Courts and elementary writers, was "founded upon reasons which had long since ceased to exist," and therefore, should be abrogated. We are unable to subscribe to the conclusion, or the reasons assigned for it.

Even if the reasons that led to the adoption of this rule have ceased to exist, it does not necessarily follow that the rule itself should be annulled. As, for instance, the reasons for selecting a jury to try a cause from the vicinage where the controversy arose, has long since ceased to exist, but the practice of taking them from the body of the county where the crime was committed, or the suit is being tried, has continued as a wise one from the time of the year books until the present day, without any very general desire to change it. Besides, in what respect has the reason ceased to exist which led to the establishment of this rule, since it was adopted? By a legal fiction, the Court, in ancient times, permitted a party to bring suit in what was termed transitory actions, in any county within the realm where the defendant could be found, by stating in the declaration where the cause of action arose, and adding under a *videlicet*, the county where the suit was brought.

This was done for the purpose of facilitating the administration of justice; and was the reason any less forcible, or has it ceased to exist, for allowing a party to elect in cases like the present one, to sue the defendant in either county where he might be found? or, as in the case we are considering, be deprived of any remedy at all, except in some Superior Court that has the power to send its process out of the county?

If a man is required to answer for his own wrongful act, is there any good reason why he should not be made to respond in the county where he committed the deed which produced the result, as well as where the injury was sustained? It is no answer to say that the defendant had a perfect right to construct the dam on his own ground, and therefore he committed no wrongful act, in the county of Stark for which a suit would lie against him.

If every person is free to use his own property as he may desire, he cannot do so in such a way as to encroach upon the

 Clark v. Gotts.

rights of his neighbor. Hence, the appellee in constructing this dam upon his own land, knowing at the same time that in the ordinary course of things, it must cause the injurious flooding of appellant's premises, he was doing an act which he had no right to perform. For in that case he was making use of his land in such a manner as to interfere with the rights of adjoining proprietors.

Being unable to discover any valid reason why he should not be made to answer for that wrongful use, in the county where the act was committed, the judgment of the Circuit Court will be reversed and the cause remanded.

Judgment reversed.

PILLSBURY J. dissenting. A Justice of the Peace derives his jurisdiction from the statute alone, and the statute has not conferred upon him the jurisdiction in actions for damages to real estate located in a county different from his territorial jurisdiction.

The opinion admits that the action is local and the injury occurred in Bureau county. That being so, the justice cannot look to the common law to aid his jurisdiction but is concluded by the statute.

 BARRETT B. CLARK

V.

SAMUEL GOTTS.

1. PARENT AND CHILD—DUTY OF PARENT TO SUPPORT.—The duty of parents to provide for the maintenance of their children is a principle of natural law, and this natural obligation is a sufficient consideration to support an express promise by a father to pay for necessities furnished his child, and under certain circumstances may be sufficient to raise an implied promise to that effect.

2. DUTY OF PERSON FURNISHING NECESSARIES.—A party furnishing necessities to an infant, is bound to inform himself of the condition of the child and the reasons why the parent does not provide for it himself, and if it cannot be shown that the necessities of the child are the result of the parents' act, no action can be maintained on such implied promise.

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58	577
1	454
68	123

Clark v. Gotts.

3. **BURDEN OF PROOF IN SUCH CASES.**—Where a third party furnishes means for the support of the child, he must take the burden of showing that the parent expressly promised to pay for the same, or such facts and circumstances bearing upon the question of the parent's neglect, and his evident intentions and purposes regarding the necessities of the child and provision therefor, as that a promise can be properly inferred therefrom.

4. **PREPONDERANCE OF TESTIMONY.**—It does not necessarily follow that the testimony of two witnesses should outweigh that of one, in all cases. The one may be supported by all the other facts and circumstances in the case, to such an extent that the testimony of the one induces belief, as being reasonable and probable, while that of the two do not. The weight of testimony is for the jury, and while they have no right to arbitrarily disregard the testimony of an unimpeached witness, yet they are to consider it in connection with all the circumstances in proof, and give it such weight as it is entitled to.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

Messrs. BARBER, RANDALL & FULLER, for appellant; that evidence of the father's ill-treatment of his daughter should have been received, as tending to show why she lived away from home, cited *Hunt v. Thompson*, 3 Scam. 179.

That it is always a question for the jury whether under the circumstances the father's authority is to be inferred: *Tyler on Infancy and Coverture*, 106; 2 Kent's Com. 193; *Van Valkinburg v. Watson* 13 Johns. 480; *Baker v. Keen*, Starkie, 501; *Mortimer v. Wright* 6 M. & W. 482; *Rawlins v. Vandyke*, 3 Esp. 252; *Stanton v. Wilson*, 3 Day, 37; *Call v. Ward*, 4 Watts & Serg. 118.

As to the liability of a parent to support his child: *Simpson v. Robertson*, 1 Esp. 17; *Ford v. Fothergill*, Ia. 211; *Stanton v. Wilson*, 3 Day 37; *Van Valkinburg v. Watson*, 13 Johns. 480; *Benson v. Reinington*, 2 Mass. 115; *Nightingale v. Withington*, 15 Mass. 274; *Keen v. Sprague*, 3 Greenl'f, 77; *Plummer v. Webb*, 4 Mason 380; *Gale v. Parratt*, 1 N. H. 28; *Day v. Everett*, 7 Mass. 145; *Wood v. Wood*, 3 Ala. 756; *In re Ryder*, 11 Paige, 187.

That an instruction given for the defendant, bringing into prominence the testimony of one witness and ignoring the fact that she was contradicted by two witnesses, was erroneous:

Clark v. Gotts.

Chapman v. Cawrey, 50 Ill. 512; Trish v. Newell, 62 Ill.; 196 Aurora Fire Ins. Co. v. Eddy, 55 Ill. 213; Baldwin v. Killian, 63 Ill. 550; C. B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510; I. C. R. R. Co. v. Maffit, 67 Ill. 431.

Instructions should not be prolix nor argumentative: Rockford Insurance Co. v. Nelson, 75 Ill. 548; C. B. & Q. R. R. Co. v. Griffin, 68 Ill. 499; Merritt v. Merritt, 20 Ill. 65; Thompson v. Force, 65 Ill. 370; Thorne v. McVeagh, 75 Ill. 8.

Mr. W. S. MEYERS and Mr. L. S. PARKER, for appellee; contended that evidence of directions having been given to charge the goods to the defendant was rightfully excluded, and cited Cooley's Blackstone, 448; Chitty on Con. 140; 3 Scam. 181; Holt v. Baldwin, 2 Am. Rep. 515; Kelly v. Travis, 6 Am. Rep. 499.

Courts will reluctantly interfere and grant a new trial, where the proceedings have been regular: Wickersham v. The People, 1 Scam. 128; Eldridge v. Huntington, 2 Scam. 535.

PILLSBURY, J. This action was originally commenced before a justice, and taken by appeal to the Circuit Court of Will county.

Two trials have been had at the circuit.

In the first, the plaintiff recovered verdict and judgment, and on appeal to Supreme Court by defendant the judgment was reversed and cause remanded: 78 Ill. 229.

On the second trial verdict and judgment were rendered for the defendant, and the plaintiff brings the case here by appeal.

The action is brought to recover for goods sold to the wife and minor daughter of the defendant, and the defendant relies upon payment by the wife for the goods obtained by her, and denies his liability to pay for the goods sold to the daughter.

The daughter was not living at home at the time she obtained the goods from appellant, and the former judgment in favor of the appellant was reversed because he did not show any express promise on the part of the appellee to pay for them or prove any circumstances from which such promise could be

Clark v. Gotts.

legally inferred. On the re-trial of the cause, the appellant offered to prove all the circumstances attending the leaving of her home by the child; that the father treated her cruelly and turned her out of his house; and the wages she was able to obtain from her labor.

The Court excluded all such offered evidence, and the appellant reserved an exception to such ruling, and now assigns the same for error.

The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. 1 Black. Com. 447.

This natural obligation is a sufficient consideration to support an express promise by a father to pay for necessities furnished his child, and under certain circumstances may be sufficient to raise an implied promise to that effect.

While the municipal law has afforded no means of enforcing this duty imposed by nature, as such, yet, the experience of mankind has shown, that in certain instances the parent had not enough of that "natural inextinguishable affection which Providence has implanted in the breast of every parent" to prevent him from turning his helpless infant out upon the world to suffer for the want of food and clothing actually necessary for the preservation of life, when the unnatural father has been of sufficient ability to maintain, protect and educate his child in accordance with this natural obligation; in such cases, when the stranger, who was under no such obligation to the infant, had relieved its necessities, the common law, ever ready in the interest of justice, to furnish a remedy consistent with its principles, for every wrong, inferred that the parent had promised to pay the stranger for the necessities thus furnished his child, thereby placing the right to recover upon contract rather than enforcing the natural duty as a common law obligation. At the same time the rights of the parent are fully protected.

Clark v. Gotta.

A party furnishing necessities to an infant is bound to inform himself of the condition of the child and the reasons why the parent does not provide for it himself, and if it cannot be shown that the necessities of the child are the result of the parent's act, no action can be maintained upon such implied promise.

The parent is to be the judge of the wants of the child, and of his ability to supply them, and where a third party furnishes means for the support of the child, he must take the burden of showing to the satisfaction of the court and jury, that the parent expressly promised to pay for the same, or show such facts and circumstances bearing upon the question of the parent's neglect and treatment, and his evident intentions, views and purposes, regarding the necessities of, and provision for the child, that a promise can be properly inferred therefrom.

And it will be for the jury to say, in a given case, whether all the facts and circumstances warrant the finding of a promise expressed or implied. *Hunt v. Thompson*, 3 Scam. 179; *Kelly v. Davis*, 49 N. H. 480; *Tyler on Inf. and Cov.* 106.

In *Oatfield v. Waring*, 14 Johns. 188, which was assumpsit brought to recover compensation for supporting defendant's slave, the point was made that the facts proved did not justify an inference that the maintenance of the defendant's slave was at his request. SPENCER, J. said: "A request may be inferred from the beneficial nature of the consideration, and the circumstances of the transactions."

In *Van Valkinburg v. Watson*, 13 Johns. 480, the Court said: "A parent is under a natural obligation to furnish necessities for his infant children; and if the parent neglect that duty, any other person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit must be acquainted with at his peril."

In the case of *Bainbridge v. Pickering*, GOULD, J. says, with great propriety: "No man shall take upon himself to dictate to a parent what clothing the child shall wear, at what time

they shall be purchased, or of whom. All that must be left to the discretion of the father. Where the infant is *sub potestate parentis*, there must be a clear and palpable omission of duty, in that respect on the part of the parent, in order to authorize any other person to act for, and charge the expense to the parent."

In *Hunt v. Thompson*, 3 Scam. 179, it is said: "If it had been proved that it was by the command of the defendant that this son had remained abroad until additional clothes became necessary, and he neglected to provide them, an authority in one who should supply his omission of duty might well be presumed."

This case at bar was reversed by the Supreme Court because no reason was shown in the evidence why she did not live at home, and the circumstances proven would not justify the inference that she had authority to buy the goods on the credit of defendant. 78 Ill. 229.

The doctrine is here clearly implied, as stated in *Tyler on Infancy and Coverture*, "that the child need not, however, have an express authority to bind his parent, for an authority may be implied under certain circumstances, and it is always a question for the jury whether the circumstances are sufficient for that purpose."

In *McMillen v. Lee*, 78 Ill. 443, the Supreme Court, while recognizing the principle that the right of recovery in such cases rests upon a promise expressed or implied, hold that where the father and mother separate, and the father permits the mother to take the children with her, he constitutes the mother his agent to provide for the children, and is bound to pay for necessities furnished the child at request of the mother.

We are, therefore, of the opinion that the Court below erred in excluding from the jury the offered evidence.

The fourth instruction asked by appellant was properly refused. It does not necessarily follow that the testimony of two witnesses should outweigh that of one in all cases. The one may be supported by all the other facts and circumstances in evidence to such an extent that the testimony of the one induces belief as being reasonable and probable, while that of

Feldman v. City of Morrison.

the two do not. The weight of the testimony is for the jury, and while they have no right to arbitrarily disregard the testimony of an unimpeached witness, yet they are to consider it in connection with all the circumstances in proof, and applying reason and judgment to it give it such weight as it is entitled to.

This will also apply to the fourth instruction given for appellee.

The jury may be justified in many cases in disregarding the testimony of a witness without imputing to such witness the crime of perjury.

The judgment must be reversed and the cause remanded.

Judgment reversed.

JACOB FELDMAN

V.

THE CITY OF MORRISON.

1. DRAM SHOP LAW—SALE OF LIQUORS WITHOUT LICENSE.—The dram shop law prohibits the sale without license of certain specified liquors and an expression of these must, under a familiar rule, be held to be an exclusion of all others not enumerated, hence no license can be required for the sale of fluids not included among those for the sale of which a license is necessary.

2. SALE OF CIDER—PROOF OF INTOXICATING QUALITIES.—The object of the Legislature in declaring that spirituous, vinous and malt liquors, were intoxicating, was to render it unnecessary to prove it on the trial. Cider not being a fluid belonging to either of the classes mentioned, is not intoxicating by legislative enactment, and in a prosecution for selling cider as an intoxicating liquor, proof should be made that such fluid is intoxicating.

3. PROOF.—Although Courts have said that jurors might, from their own knowledge alone, determine that whiskey, brandy and other liquors, which are always intoxicating, were so, this should not be so as to that which might, or might not be an intoxicating fluid when sold.

APPEAL from the Circuit Court of Whiteside county; the Hon. W. W. HEATON, Judge, presiding.

Mr. O. F. WOODRUFF, for appellant; that under the ordinance in question, the facts established do not warrant a

Feldman v. City of Morrison.

finding for the plaintiff, cited *Kettering v. City of Jacksonville*, 50 Ill. 39 ; *Caswell v. The State*, 2 Humph. 402 ; *The State v. Moor*, 5 Blackf. 118 ; *South Evanston v. Mares*, 1 Chicago Law Jour. 58 ; Rev. Stat. 1874, 224.

Mr. F. D. RAMSAY, for appellee; contending that cider is intoxicating, cited *United States Dispensatory*, 84,

That it was not incumbent upon the city to prove that it is intoxicating: *Kettering v. City of Jacksonville*, 50 Ill. 39.

LELAND, P. J. The city of Morrison, by an ordinance, approved by the Mayor, April 29, 1874, ordained and adopted, substantially, Sections 1 and 2 of Chapter 43 of the Revised Statutes of 1874, on the subject of dram-shops, except, that all the words after the words "twenty dollars," are omitted. Otherwise it is, in substance, like the statute, and it should receive the same construction.

A suit was commenced in the name of the city against appellant before a justice of the peace. The summons was in the usual form enacted in Sec. 17 of Chap. 79, for Justices. On the trial, the defendant was found guilty as charged, and there was judgment that the city have and recover of defendant fifty dollars and costs.

The case was appealed to the Circuit Court, where there was a trial before the Court without a jury. The Court found the issues for the plaintiff, whereupon it was ordered that said defendant be and he hereby is fined the sum of twenty dollars, and that he pay the same to plaintiff, with all the costs in this proceeding.

The action was one brought by the city against the defendant for selling, in June, 1877, the juice of apples, expressed the preceding October, and denominated cider. The only evidence in the cause is the stipulation of the parties which is, in substance, as follows:

That the ordinance was duly passed, setting it out, that the defendant sold cider by the glass in June, 1877, to be drank on the premises where sold; that it was drank there and in the city and paid for at five cents the glass; that the said cider

Feldman v. City of Morrison.

was made in the month of October preceding, and the natural fermentation allowed to take place between the making and the sale; and that defendant kept a baker's shop and restaurant, and not a dram shop; and this was all the evidence.

It will be perceived that there was no evidence of any witness that the fluid was intoxicating liquor, and the point most strongly urged by appellant is, that the judge who tried the cause below could not, if it was not intoxicating by enactment, determine that it was, by applying his own general knowledge of cider and its effects upon mankind, or his special knowledge of its effect upon himself. If this fluid be either a spirituous, vinous or malt liquor, then the Legislature has enacted that the cider mentioned is intoxicating liquor, and it is so by legislative enactment, if in no other way. The counsel for the appellee insists earnestly that it is intoxicating *per se*, and also by legislation as a "vinous" liquor. He does not seriously insist that cider could properly be termed a "spirituous" liquor, and we certainly have no knowledge of having heard it so denominated. It is not produced by distilling: *Walker v. Prescott*, 44 N. H. 511; *Caswell et al. v. State*, 2 Humph. 412; *The State v. Moon*, 5 Blackf. 118. It surely cannot be called malt liquor.

In determining whether cider is a vinous liquor, we must take a common-sense view of what the Legislature meant by the use of the word "vinous." If we could apply our judicial knowledge to the subject so far as to perceive who were legislators when the act was passed, and how many of them had apples to gather and cider to make and sell, we would suppose that they did not mean to include cider in the act, as a fluid for the sale of which there should be a license. But let us endeavor fairly to ascertain what the word "vinous" does mean.

Without endeavoring to trace it any further back, we may say that it is derived from the Latin *vinum*, wine, and so named because made from the fruit of the vine. Wine is defined in Worcester's Dictionary, after the statement of its derivation, and after reference to the word in the language of many nations, and among others to the Latin *vinum*, as meaning first the fermented juice of the grape. Second, the fermented

Feldman v. City of Morrison.

juice of certain fruits resembling in many respects the wine obtained from grapes, but distinguished therefrom by naming the source whence it is derived, as ginger wine, gooseberry wine, currant wine, etc. Nothing is said about apple wine or pear wine, unless they are included in the, etc.

It is also said in this dictionary "that some chemists apply the term wine to any saccharine solution, the sugar of which has been wholly or partially changed into alcohol.

If the city ordinance, or the statute might include among the "vinous" fluids those which come from the juice of fruits which grow on vines and bushes, and are named wine, we do not think it should be construed so liberally as to apply the term *vinous* to the juice of fruits which grow on trees. And in common parlance, cider and beer are never called vinous liquors or wine, although there may be found in works on chemistry, general expressions that "wine is the expressed juice of ripe fruits containing sugar, which causes it to readily undergo fermentation," as stated in appellee's brief. Appellee's counsel has certainly made a very scientific and thorough examination of the subject, and we have read his brief with much interest, but we still think that cider is not wine, and that it is not intoxicating liquor by legislative enactment, as "vinous."

If it has not been enacted to be such, then we think it should have been proved upon the trial to have been intoxicating, and that as there was no testimony to that effect, the finding was not supported by the evidence.

It is evident that the object of the legislation that spirituous, vinous and malt liquors were intoxicating, was to render it unnecessary to prove it on the trial. Where the statute simply imposes a penalty for selling intoxicating liquor, without naming any kind as such, cider should, we think, be proved to be intoxicating. If cider had been named in the statute, or ordinance, and its sale prohibited under penalties, then the case of *Kettering v. City of Jacksonville*, 50 Ill. 39, would be in point for appellee. See also *Cone v. Dean*, 14 Gray, 99, as to cider, when named in the act.

It was therefore a question of fact whether cider of the kind sold was intoxicating liquor, to be determined by the jury, or

Feldman v. City of Morrison.

by the Court acting as a jury. Suppose that cider of a certain age may have enough of alcohol in it to produce intoxication, if the quantity taken is large enough, still it might be that no amount of the kind sold in this case could be taken large enough to produce such effect. Cider, for some period of time after the juice is pressed from the apple, has no intoxicating principle in it at all, and if a jury could say that it was intoxicating liquor in June without evidence, could they also say just what time between October and June it became so? When did acquitting days end and convicting days begin?

We do not think the fact whether the cider in this case was intoxicating when sold was one to be ascertained by jurors by applying their own knowledge only. Though courts have taken judicial notice, and have said that jurors might, from their own knowledge alone, determine that whiskey, brandy, and other liquors which are always intoxicating were so, this should not be so as to that which might or might not be an intoxicating fluid when sold, but only to that kind which is always so and known to everybody to be so.

We have not deemed it necessary to refer to any adjudged cases on the subject, as none were cited in the brief of appellant or appellee.

In our judgment, however, cider is not within the spirit, or more accurately speaking, not within the liquor of the act. It could not have been intended that a farmer who desired to sell cider on the farm in quantities less than a gallon, or who may have desired to take a barrel of it to a fair to be retailed by the glass, should first obtain a license to keep a dram shop, nor should the giving a glass to a minor on the farm violate Sec. 6. Nor do we consider that the act was intended to include persons situated as the defendant is, who sell cider and not any spirituous, vinous or malt liquors.

A dram shop is defined as a place where spirituous, vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act. Under the maxim that the expression of one is the exclusion of another, the fluids not included among those for the sale of which a license is necessary,

Feldman v. City of Morrison.

should be excluded and no license as to them be required. The license under Sec. 4 would, of course, be one to sell spirituous, vinous or malt liquors. To sell without license that which should be licensed, would be an offense. To sell that without license for selling which a license need not be obtained, would not be an offense.

It being made necessary only to obtain a license to keep a shop where spirituous, vinous and malt liquors are sold, it cannot be necessary to have a license to keep a place wherein fluids which are not spirituous, vinous or malt liquors may be sold. Intoxicating liquors, therefore, mentioned in the second section is that fluid for which it is necessary to have a dram shop license. As there are so many fluids in which alcohol is contained, either in an infinitesimal or slight quantity, and as alcohol when used as drink is intoxicating either in a perceptible or an imperceptible degree, the Legislature deemed it proper to draw a line somewhere, and though there may be no good reason why very old cider and lager beer should not be on the same side of it, it was drawn in our judgment, between those fluids which were spirituous, vinous and malt liquors on the one side, and those which do not come within that definition on the other, though they may contain some alcohol, the idea being to prohibit the sale, without a license of those fluids, the drinking of which produces a substantial, perceptible intoxication by the use of them, and these were defined as aforesaid. Of course if there were a fraudulent admixture of spirituous, vinous or malt liquor with the cider, the sale of such a mixture without a license would be unlawful.

As there is no case made against the defendant according to the facts as stipulated, the judgment is reversed.

Reversed.

Kent v. Mason.

EDMUND B. KENT, Adm'r, etc.

v.

JEREMIAH V. MASON, Ex'r, etc.

1. EVIDENCE—PROOF OF CONDUCT IN TRANSACTIONS WITH OTHER PARTIES.—The fact that a person on one or more occasions receives payment of a debt without surrendering the evidence of indebtedness, satisfactory reasons for not doing so being given at the time, is not admissible as tending to show that any other notes still remaining in his possession have been paid or discharged by the maker. Such a rule would preclude a person from deviating from the usual course of business, no matter under what circumstances, lest it should be construed into proof that he had done or intended so to act with all others.

2. PRACTICE—OBJECTIONS TO MATTER OF SUBSTANCE IN DEPOSITIONS—WHEN TO BE MADE.—Objections to interrogatories and answers in depositions should be made and disposed of before the commencement of the trial.

3. REFERENCE TO MEMORANDUM.—A witness may refer to a memorandum made by himself, to refresh his memory, but the memorandum itself is not admissible in evidence, except in cases where the witness at the time of testifying, has no recollection of what took place further than that he accurately reduced the whole transaction to writing.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. H. BIGELOW, for appellant; against the admission of testimony of the manner of dealing with other parties as tending to show that the notes in question had been paid but not surrendered, cited Kent, adm'r, v. Mason, ex'r, 79 Ill. 540.

That it is the right of a party to have incompetent testimony excluded on his objection, whenever offered: C. B. & Q. R. R. Co. v. Lee, 60 Ill. 501.

That testimony that Gould "was a close, hard collector," should have been excluded; it tended to excite the prejudice of the jury and did not tend to prove the fact of payment: Anderson v. Rome, & Watertown R. R. Co. N. Y. 334.

Upon the question of objection to interrogatories because leading: 1 Greenl'f Ev. § 434.

As to the right of the husband of one of the heirs of the deceased to testify for the estate: Cutright et al. v. Stanford, et al. 81 Ill. 240.

Kent v. Mason.

That where there is a total lack of evidence upon any material point in the case it is the duty of the Court to so instruct the jury if asked: *Stowell v. Beagle*, 79 Ill. 525.

The fact that the notes were never assigned and were in possession of the deceased during his life-time and found among his papers at his death is strong evidence that they were his property: *Thompson v. Hoagland et al.* 65 Ill. 310.

Messrs. STEWART & PHELPS, for appellee; argued that possession of the notes is only *prima facie* evidence of ownership, and cited *Story on Promissory Notes*, § 381.

That the husband of an heir to an estate may testify on behalf of the estate: *Kent, adm'r, v. Mason ex'r*, 79 Ill. 540.

It is for the jury to decide what the evidence proves, and instructions which endeavor to usurp their province, are erroneous: *Frasure v. Zimmerly*, 25 Ill. 202; *Winne v. Hammond*, 37 Ill. 99; *Dart et al. v. Horn*, 20 Ill. 212; *Duffield v. Delancey*, 36 Ill. 258.

That the instructions asked for by appellant could not have failed to mislead the jury and were properly refused: *Hosley v. Brooks et al.* 20 Ill. 116; *Harris et al. v. Miner*, 28 Ill. 136; *Baxter v. The People*, 3 Gilm. 368; *Stout v. McAdams*, 2 Scam. 67; *Denman v. Bloomer*, 11 Ill. 177; *C. B. & Q. R. R. Co. v. George*, 19 Ill. 510; *Pfund v. Zimmerman*, 29 Ill. 269.

Where the evidence is conflicting, the verdict will not be set aside: *Morgan v. Ryerson*, 20 Ill. 343; *Milliken v. Taylor*, 53 Ill. 509; *Chicago v. Garrison*, 52 Ill. 516; *Voltz v. Stephani*, 46 Ill. 54; *Bagely v. McClure*, 46 Ill. 381; *Baker v. Robinson*, 49 Ill. 299; *Chicago v. Smith*, 48 Ill. 107; *Crain v. Wright*, 46 Ill. 107; *McCarthy v. Mooney*, 49 Ill. 247; *Keith v. Fink*, 47 Ill. 272; *Hope Ins. Co. v. Lonergan*, 48 Ill. 49.

Where substantial justice has been done, a judgment will not be reversed merely because proper instructions were refused: *Schwarz v. Schwarz*, 26 Ill. 81; *Hall v. Groufe*, 52 Ill. 421.

Where a case has been twice tried with the same result, and it is apparent that a re-trial will not change the result, the judgment will not be reversed, although there was error in some of the instructions or evidence: *Pahlman v. King*, 49

Kent v. Mason.

Ill. 266; Rankin v. Saylor, 49 Ill. 451; Watson v. Woolverton, 41 Ill. 241; Potter v. Potter, 41 Ill. 80; Coursen v. Ely, 37 Ill. 338; Root v. Curtis, 38 Ill. 192.

Where substantial justice appears to have been done, the judgment will not be disturbed, even if the jury have found against the weight of evidence: Leigh v. Hodges, 3 Scam. 15; Gillett v. Sweat, 1 Gilm. 475; Elam v. Badger, 23 Ill. 498; Dishon v. Schorr, 19 Ill. 59; Schultz v. Lepage, 21 Ill. 160; Boynton v. Phelps, 52 Ill. 210.

SIBLEY, J. This was an action commenced in the Probate Court of Warren county, in May 1872, to recover upon two promissory notes executed by Jeremiah Mason, in his lifetime, to Sylvester S. Gould, deceased. One for the sum of \$1,200, dated Jan'y 9, 1860, payable in two years after date, and the other for \$400, dated May 24, 1860, due in one year from the date of it.

The cause was tried in the Probate Court December, 1874, where a verdict was rendered in favor of the plaintiff for the amount due on the notes. An appeal was taken from the judgment rendered upon the verdict to the Circuit Court of Warren county, and a trial was there had before a jury which resulted in a verdict for the defendant in that court. The case was appealed to the Supreme Court, where that judgment was reversed, and the cause was remanded, and again in September, 1877, tried in the Circuit Court with the same result. To reverse this judgment, Gould's Administrator has appealed to this court, and assigned several errors for setting aside the verdict of the jury, and the judgment of the Circuit Court.

Mason in his lifetime executed a deed of trust on the S. E. qr. of Sec. 17, T. 10, N. R. 4 E., to Zeno E. Spring, as trustee, to secure the payment of the \$1,200 note. The \$400 note was given without any security. At the time of the execution of the deed of trust to Spring the land described in it was incumbered by judgments and other liens, among which was a deed of trust dated May 26, 1859, executed by Mason to Jacob D. Hand, as trustee, to secure the payment of a note to William H. Kellogg for \$1,437. Another executed by Mason to Hand,

Kent v. Mason.

as trustee, to secure a note payable to Sylvester Reed for \$732.-65, dated Feb. 19, 1859. These deeds of trust covered also the southwest qr. of Sec. 2, T. 9 N. and R. 4 E. in Knox county, on which tract there were other incumbrances. The trustee in the last two deeds of trust, after the notes which they were given to secure became due, sold the lands described in them—the southwest qr. of Sec. 2, except 34 acres,—to Quincy H. Drum for the sum of \$2,000, and the southeast qr. of Sec. 17 to Leander Douglas (the attorney of Mason), for \$925. On a settlement afterward made between Drum, Douglas and Mason, and Mason and wife, in respect to homestead exemption and dower of Mrs. Mason, several conveyances were interchanged to and by each of the parties engaged in the arrangement.

The defense set up, was that the notes sued on were either owned by Drum or that he was acting as the agent of Gould, and that they were taken into account and paid to Drum in the settlement and exchange of deeds by him, Douglas and Mason and wife.

The notes were never indorsed, but remained in Gould's possession and were found after his death, which occurred in 1870, in a desk together with the deed of trust to Spring, (which had not been released) among his other papers.

For the purpose of showing that these notes had been paid and not surrendered by Gould to Mason, the Court permitted the appellee (against the objection of appellant) to read to the jury in the deposition of Wm. H. Kellogg that a certificate of deposit or receipt given by him to Gould for \$1,200, in the fall of 1870 was soon after that paid by him to Gould, without the latter surrendering up to the former the certificate of deposit or receipt at the time of payment, and the reason assigned was that Gould said "his woman had got hold of some of his papers and notes and had left; that he could not find the receipt; also that the witness paid a note of his for two or three hundred dollars to Gould, that could not be found. On the first trial in the Circuit Court, the appellant asked the Court, to instruct the jury as follows:

9. "The fact, if proven, that the witness Kellogg was indebted to Gould upon a receipt or certificate of deposit for

Kent v. Mason.

money loaned, and that Kellogg paid the same to Gould, and that Gould did not deliver it up to Kellogg, furnishes no evidence whatever that the notes, or either of them, in this case were paid; and further, it is not evidence of, and should not be considered by the jury as tending to prove or establish any reason whatever why the note secured by the trust deed to Spring was not surrendered or delivered up if the same was paid," which the Court refused to do. When the case went to the Supreme Court, this refusal was assigned for error, and that Court, in passing upon the subject, says: "As to the instructions, we are of opinion that the seventh and ninth asked by the appellant should have been given." 79 Ill. 540.

Why the Circuit Court admitted this evidence after the Supreme Court had really decided the question of its relevancy, may be a matter of conjecture. We think that the opinion expressed by the Supreme Court is more in harmony with the law of evidence than the ruling of the Circuit Judge.

Is the fact that a person, on one or even more occasions, receives payment of a debt without surrendering the evidence of indebtedness upon satisfactory reasons given at the time for not so doing, to be converted into a circumstance tending to show that any other notes still remaining in his possession, have been paid, or discharged by the maker of them? Clearly not; for in that case a man would be precluded from deviating in any transaction with one person, out of the usual course of business, no matter what the circumstances were, lest it should be construed into proof that he had done, or intended so to act with all others.

Complaint is made because the Court allowed the appellee to read to the jury interrogatory 14 and answer, in the deposition of the witness Leander Douglas.

The interrogatory to the witness inquiring: "Whether the parting of Mason with the 240 acres of land did or did not free him from the indebtedness with which the land was incumbered." Besides being leading, it was faulty in asking the witness to state his conclusions from certain transactions between him, Drum and the Masons, instead of relating the facts that took place and allowing the jury to draw their own conclusions.

But this, like many other of the interrogatories and answers objected to, should have been made and disposed of before the commencement of the trial, in order to have made the exception available. Such objections as can be cured by retaking the deposition of the witness, should be pointed out and excepted to on a motion to suppress, before the trial is commenced, which does not appear to have been done in this case. *Corgan et al. v. Anderson*, 30 Ill. 95; *Cook v. Orne*, 37 Ib. 186.

The admission of the pass-book of the witness Saylor to the jury was irregular. He had testified that from memory he recollected the conversation between him and the witness Cover, independent of the memorandum, made in his pass-book and read over to Cover. Saylor, at the request of Mason's representatives, went to Cover, who was engaged as sheriff in the matter of setting off the homestead to the Masons, for the purpose of gathering up all the statements he could in relation to the settlement of these notes, and furnishing whatever evidence he was able, to aid the Masons in their defense to this action. Cover having no interest in the result, stated on the trial that he knew nothing about the settlement of the notes in controversy by Drum. Saylor's memorandum was introduced to impeach the witness Cover, by showing that at one time he had made a different statement to Saylor.

That a witness may refer to a memorandum made by him to refresh his recollection is a familiar principle. But the memorandum itself is not admissible in evidence, except in cases where the witness, at the time of testifying, has no recollection of what took place further than that he accurately reduced the whole transaction to writing. 1 Greenl'f on Ev. 437.

We also think that the witness, Spring, should have been permitted to answer the question as to what reply Drum made when Gould presented these notes to him for payment. The defense set up was, that the notes had been paid or settled for by Drum either as the agent of Gould or as the owner of them at the time the interchange of deeds took place between him, Douglas and the Masons, in 1862. About 1864, or soon after Mason got his 80 acres back, under the arrangement spoken of by the witnesses. Spring testified that he went with Gould

C. B. & Q. R. R. Co. v. Boger.

who presented the notes in controversy to Drum and demanded payment of them, which was refused. Gould had them and continued to retain the possession of the notes, and when he presented them to Drum, demanding their payment, what was then said and done by the parties should have been admitted as a part of the *res gestae*.

For the reasons given, the judgment will be reversed and the cause remanded.

Judgment reversed.

THE CHICAGO, BURLINGTON & QUINCY R. R. Co.

v.

CALVIN BOGER.

1. RAILROADS—EXPULSION OF PASSENGER—EVIDENCE.—On the trial, appellant offered testimony that on previous occasions the train had been boarded in that locality by roughs and confidence men who had attacked the brakeman, in explanation of the reason why the brakeman was armed with the billet with which appellee was struck. *Held*, that the evidence should have been admitted. Appellee was claiming exemplary damages of the company for the willful misconduct of one of its servants, and in mitigation of such damages it was allowable to show the reason why the brakeman became armed with this weapon.

2. EXPELLING FROM TRAIN BETWEEN STATIONS.—The rule that railroad companies have no right to expel a passenger, except at a regular station, though correct as a general rule of law, is not applicable in all cases. Appellee had been once thrust off the train at a regular station, and as the cars were moving out from that station, he again leaped on to the train. Under such circumstances he was not in all respects entitled to the same consideration as if he had not been once expelled for neglecting to comply with the rules of the company. He occupied quite a different position from that of a person who might enter the cars under a mistaken notion that he had a right to do so.

3. FORCE USED IN EJECTING—EXEMPLARY DAMAGES — INSTRUCTIONS.—An instruction to the effect that if the jury find that the plaintiff was put off the train at a place not a regular station, by the willful and wrongful act of the defendant, they may consider, in fixing the amount of damages, not only the annoyance, vexation, delay and risk to which plaintiff was subjected, but also the indignity done him by the mere fact of expulsion, and that it would make no difference whether the brakeman acted in good faith or not,

C. B. & Q. R. R. Co. v. Boger.

if he acted willfully, is erroneous. Good faith means the opposite of willful and criminal conduct, and the act complained of must partake of a wanton or criminal nature, else the amount sought to be recovered must be confined to actual compensation, and damages for the indignity suffered cannot be recovered.

4. RIGHT OF COMPANY TO ESTABLISH RULES—AUTHORITY OF ITS SERVANTS.—A railroad company has the right to establish rules requiring passengers to produce their tickets before entering the cars, and it may direct the brakemen of the train to require observance of these rules.

5. INSTRUCTION TO DISREGARD EVIDENCE—"FALSUS IN UNO, FALSUS IN OMNIBUS."—The maxim "*falsus in uno, falsus in omnibus*" should only be applied in cases where a witness *willfully* and knowingly gives false testimony, and an instruction based upon that maxim which ignores the fact whether the false statement was intentional or not on the part of the witness, is erroneous.

APPEAL from the City Court of Aurora ; the Hon. FRANK M. ANNIS, Judge, presiding.

Mr. CHARLES WHEATON, for appellant; contending against the instruction given, that plaintiff might recover damages for the indignity suffered in being expelled from the train, cited 2 Greenl'f Ev. § 272; Reed v. Bias, 8 Watts & Serg. 189; Conrad v. Pacific Ins. Co. 6 Pet. 273.

As to error in the instruction to disregard the whole testimony of the witness Farnham, if the jury should find that he had sworn falsely in relation to any material fact: Chittenden v. Evans, 41 Ill. 251; C. & A. R. R. Co. v. Buttolf, 66 Ill. 347; Crabtree v. Hagenbaugh, 25 Ill. 233; Pollard v. The People, 69 Ill. 148; Brennan v. The People, 15 Ill. 511; Homes v. Hale, 71 Ill. 552; Peak v. The People, 76 Ill. 289.

That requiring purchase of a ticket and showing it before entering the cars, is a reasonable rule, and where the act of ejection is done in good faith, no vindictive damages should be allowed: T. P. & W. R. R. Co. v. Patterson, 63 Ill. 304; C. & A. R. R. Co. v. Flagg, 43 Ill. 364; Pullman Palace Car Co. v. Reed, 75 Ill. 125; B. & O. R. R. Co. v. Blocher, 27 Md. 277; City of Decatur v. Fisher, 53 Ill. 407.

Messrs. LITTLE & WHITE, for appellee; that the jury were warranted in finding punitive damages, cited Johnson v. Camp,

C. B. & Q. R. R. Co. v. Boger.

51 Ill. 219; Jasper et al. v. Purnell, 67 Ill. 358; C. & A. R. R. Co. v. Flagg, 43 Ill. 364; Atlantic & Great Western R'y Co. v. Dunn, 2 Am. Rep. 382; Palmer v. Railroad, 16 Am. Rep. 750; 2 Am. Rep. 39; 16 Am. Rep. 404.

SIBLEY, J.—The appellee brought this suit in the City Court of Aurora to recover damages of the Chicago, Burlington and Quincy Railroad Company, for having been put off from one of the company's fast through trains running from Chicago to Omaha. That he was expelled from the cars at the Great Eastern crossing in Chicago, there is no dispute. But the question on the trial in the City Court was as to the right and manner of expulsion. Only two witnesses testified respecting the main facts—the plaintiff in the cause and the brakeman on the train that expelled him. As usual in such cases, they differ widely in their statements as to what took place at the time. Boger, the appellee, testified that he walked slowly up State street, in Chicago, to where the train crossed the street, and hopped on to one of the cars, and rode over the bridge, when that “specimen of a man” (alluding to the brakeman, in not very courteous terms,) “came up and said, ‘Where are you going?’ and asked if I had a ticket. I said that I had not. He then inquired if I had any money, and I told him that I had money to pay my fare wherever I went. It was near the Great Eastern crossing. He then told me that I must get off; they had had enough of “dead beats on that train.” When the train stopped at that station the witness got off and started for the ticket office to procure a ticket, but for want of time did not get one, and when the train moved out got on to it again, and while on the steps of one of the cars the brakeman repeated the order to “get off,” accompanying it with some rough and abusive language. Upon his refusing to comply with the request, the brakeman struck him with a slung shot and kicked him several times; that he took hold of the brakeman's foot, having grabbed him after being struck, and would have pulled the brakeman off the train if he could, but was himself kicked from the train while it was moving at a rate of speed from eight to ten miles an hour.

Farnham, the brakeman, testified that the appellee jumped on the train near the rear car, as it was crossing State street. Witness then asked him where he was going; he answered that he was going West; inquired if he had a ticket; he replied that he had not, and had no money. Witness then told him that he must get off at the next stopping place. As the train stopped at the Great Eastern crossing, a regular station of the company's road, appellee got off. But when the train started to move out he jumped back on, saying "damned if he was not going further than that." Witness again told him that he must get off, and he said that he would not get off. "I told him that I would help him off. I took him by the collar, he grabbed me by the arm. Seeing that he was going to resist me, I kicked him twice. At the time he jumped off he pulled me to the bottom of the steps. He ran along side of the train 30 or 40 feet trying to pull me off from it. To save myself from being pulled off, I struck him with a billy, it is about six inches long and has a chunk of lead in it. He soon let go and fell to the ground."

The first error complained of which we propose to notice, is that of the refusal of the Court to permit the witness Farnham to explain the reason why he carried the billy or slung shot on that occasion. The appellant offered to prove by the witness that a short time before he had had trouble with roughs and confidence men jumping on the train as it was passing out of the city, where he had been attacked by them, and that he carried the billy for his personal protection against any future assault. We think this evidence should have been admitted to the jury. The plaintiff was claiming exemplary damages of the railroad company for the willful misconduct of one of its brakemen. Among the assumed causes was the fact that the brakeman had a billy and made use of it in expelling the appellee from the train. In mitigation of such damages it was allowable for the company to prove the reason why the brakeman became armed with this weapon. If he had procured it for the express purpose of using it upon the appellee, the malice of the act might be considered more apparent than if he was simply carrying it for another and different purpose.

C. B. & Q. R. R. Co. v. Boger.

The first instruction given by the Court below for the plaintiff, which informed the jury that the railroad company had no right to expel the appellee from its train except at a regular station, announced a rule of law generally correct, but was not entirely applicable to the evidence in the case. The proof showed the Great Eastern crossing was a regular station of the company, and that appellee was there put off by the brakeman because he had no ticket, and for the further reason the brakeman says he denied having any money to pay his fare.

Now if, as both parties state, he again jumped on the train as it was moving out of the station, knowing that by the rules of the company he had no right to enter its cars without having first procured a ticket, was he in all respects entitled to the same consideration as if he had not been once expelled for neglecting to comply with them? Not that he could be thrust off while the train was in motion, or more force used in expelling him the second time than was necessary to accomplish the purpose. But the proposition is, should he in such case be carried to the next station, or must the train back up to the place where the expulsion occurred before he could again be put off. If this is the law, how easy would it be for an evil-disposed person to pass from place to place on a train of cars until in this way he arrived at his destination, or to prevent the train from proceeding at all by causing it to back up to the station where he had been once put off every time he might be disposed to repeat the experiment. We do not understand the law to be settled in this way. It would be allowing a party to take advantage of his own wrongful act to obtain a recovery in such case simply for being expelled at a place elsewhere than at a regular station. If the rule of the company was a reasonable one, and appellee, after having once been put off the train for its non-observance, still persisted in a willful attempt to violate it by again jumping on, he certainly occupied quite a different relation to the railroad company from that of a person who might enter its cars, upon a train, under a mistaken notion that he had a perfect right to do so.

While these great corporations which to a large extent are

controlling the commerce and the travel of the country, and therefore should be held to a strict compliance with the law, yet there are also corresponding rights on their part to be observed by individuals, that if courts and juries fail to recognize, our system of jurisprudence will soon cease to command the respect of every thoughtful and unprejudiced mind.

The 4th instruction given by the Court for the appellee was as follows :

IV. "The jury are instructed that if they believe from the evidence, plaintiff was put off the said car of the defendant at a place not a regular station, or between stations, by the willful and wrongful act of the defendant, then the jury, in fixing the amount of damages, may consider not only the annoyance, vexation, delay and risk to which the plaintiff was subjected, if any, shown by the proof, but also the indignity done him by the mere fact of expulsion, and it would make no difference whether the said brakeman acted in good faith or not, if he acted willfully."

This instruction informed the jury that if they found the plaintiff was put off the defendant's train, at a place other than a regular station, then it would be proper for them to assess damages against the railroad company, not only for the annoyance and vexation, but also for any indignity done the plaintiff, by reason of the expulsion, whether the brakeman acted in *good faith* or not, if he acted willfully. In the case of the T. P & W. R. R. Co. v Patterson, 43 Ill. 304, where the plaintiff, had been put off the defendant's cars elsewhere than at a regular station, the Court says: "The act complained of must partake of a criminal or wanton nature, else the amount sought to be recovered must be confined to compensation." In that case the plaintiff Patterson was ejected from the cars in good faith by the conductor of the train, at a place other than a regular station, for the reason that he had failed to procure a ticket before entering according to the regulations of the R. R. Company, and it was there held he could only be compensated for any actual damages that he may have sustained by the expulsion, and numerous authorities are referred to in support of the rule of law.

That the railroad company had a right to establish the rule requiring passengers to produce their tickets before entering the cars, is not to be disputed and that the brakeman in this case was directed by the officers of the company to require this rule to be enforced, stands uncontradicted by the evidence.

Still the Court said to the jury that although acting upon these instructions in perfect *good faith*, yet if willfully, that is, with an obstinate determination to carry into effect his directions, then the company was liable to pay for the act, if wrongful, more than a fair compensation for the injury sustained.

Good faith means entirely the opposite to wanton and criminal conduct; then in such case according to the doctrine in the T. P. & W. R. R. Co. v. Patterson, no exemplary damages could be recovered.

If at the place where Boger jumped on to the train, the brakeman had previously (as was offered to be proven) been troubled with roughs and confidence men trying to steal a ride, and he sincerely believed this negro who had been once put off at a regular station, returning again with an oath that he was "going further" (which remark is not denied), was one of that class of persons, acted in good faith in forcibly ejecting him from the train, is the company to be punished by exemplary damages for the act? The proposition needs only to be stated, to render a refutation of it quite unnecessary.

The fifth instruction given for the plaintiff was clearly erroneous, in telling the jury that if they believe the witness, Farnham, had sworn falsely to any matter material in the case, the jury might disregard his testimony entirely, except where it was corroborated by other evidence in the case. It completely ignored the fact whether such false statement was intentional or not on the part of the witness. If the rule was not sufficiently settled that a mere mistake on the part of a witness in his testimony, should not invalidate his whole evidence, as to require any discussion respecting it, a single quotation from the case of the City of Chicago v. Smith, 48 Ill. 108, where it is said: "the maxim *falsus in uno, falsus in omnibus*, should only be applied in cases where a witness

Glenn v. Kays et al.

willfully and knowingly gives false testimony," is quite enough to dispose of the question.

We discover no reason for the court's modification of the defendant's instructions one and two, by adding *when the conductor should call for the fare*. It was competent for the railroad company to adopt the rule that no one could enter its cars on this class of trains without first exhibiting a ticket, and it had the right to empower the brakeman to see that this rule was observed, and to execute it in a reasonable manner without consulting the conductor of the train.

They both received their authority from the same source, and either might, in compliance with the orders of their principal, act independent of the other. As is shown by the evidence in this case, the brakeman was directed by the division superintendent. Hence, no reason is perceived why the brakeman should wait for the conductor before executing his orders.

Whether this regulation had been sufficiently made known to require the plaintiff, without notice, to observe it, was a question of fact for the jury to determine; and in that respect it was proper to have allowed the witness, Farnham, to answer the question as to what had been the usage of the company in regard to requiring passengers to show their tickets before entering the cars.

The judgment will be reversed, and the cause remanded for a new trial.

Judgment reversed.

YOUNG A. GLENN

v.

HENRY B. KAYS ET AL.

1. TRESPASS—HUNTING ON THE ENCLOSURES OF OTHERS.—The fact that the defendants were in pursuit of wolves or other animals *feræ naturæ*, and dangerous to mankind, for the purpose of their destruction, gives them no license to trespass with impunity upon the lands of others.

Glenn v. Kays et al.

2. PRACTICE—WAIVER OF INSTRUCTIONS.—A waiver of the right to ask the Court to give instructions to the jury does not preclude a party from assigning errors of law on an appeal.

APPEAL from the Circuit Court of Putnam county; the Hon. JOHN BURNS, Judge, presiding.

Mr. J. E. ONG and Messrs. BANGS, SHAW and EDWARDS, for appellant; argued that a motion for new trial should have been sustained because the verdict was clearly against the evidence, and cited Rev. Stat. 1874, 549; Pfeiffer v. Grossman, 15 Ill. 53; Wells v. Howell, 19 Johns. 385; Tonawanda Railroad v. Munger, 5 Den. 255; Newkirk v. Sabler, 9 Barb. 652; Hurmance v. Vernoy, 6 Johns. 5; Blake v. Jerome, 14 Johns. 406; Gilson v. Wood, 20 Ill. 37; Ously v. Hardin, 23 Ill. 403; Guille v. Swan, 19 Johns. 381; Whitney et al. v. Turner, 1 Scam. 253; Olsen v. Upsahl, 69 Ill. 273; Judson v. Cook, 11 Barb. 642; Burton v. McClellan, 2 Scam. 434; Painter v. Baker, 16 Ill. 103; Hunn v. Oldacre, 1 Starkie, 351; Van Leaven v. Lyke, 1 Com. 515; Dunckle v. Kocker, 11 Barb. 387; Woolf v. Chakler, 31 Conn. 121; Ward et al. v. Brown, 64 Ill. 307; Jack v. Hundall, 25 Ohio, 255; Ozburn et al. v. Adams, 70 Ill. 291; 1 Chitty on Pl. 178; 2 Hilliard on Torts, 231.

That the entry of appellees with their dogs upon appellant's land was a trespass: Pfeiffer v. Grossman, 15 Ill. 53; Wells v. Howell, 19 Johns. 385; Tonawanda Railroad v. Munger, 5 Den. 255; 1 Chitty on Pl. 178.

That all are liable for trespasses committed by any one of them: Gilson v. Wood, 20 Ill. 37; Guille v. Swan, 19 Johns. 381; Whitney et al. v. Turner, 1 Scam. 253; Olsen v. Upsahl, 69 Ill. 273; Judson v. Cook, 11 Barb. 642.

They are liable for all the consequences resulting from their unlawful acts: Burton v. McClellan, 2 Scam. 434; Painter v. Baker, 16 Ill. 103; Hunn v. Oldacre, 1 Starkie, 351; 2 Hilliard on Torts, 233; 1 Chitty on Pl. 397.

Mr. JAMES S. ECKLES and Mr. GEO. W. STIPP, for appellees; contending that the verdict ought not to be set aside where vindictive or nominal damages only are sought, cited Young v.

Glenn v. Kays et al.

Silkwood, 11 Ill. 36; Johnson v. Weedman, 4 Scam. 494; Plumleigh v. Dawson, 1 Gilm. 544; Comstock v. Brosseau et al. 65 Ill. 39; City of Ottawa v. Sweely, 65 Ill. 434; Wiggins Ferry Co. v. Higgins, 72 Ill. 517; Bishop v. Busse et al. 69 Ill. 403.

SIBLEY, J. Young A. Glenn, the plaintiff in the Circuit Court, commenced this action against the defendants, to recover damages in trespass, occasioned by their entering into his enclosed fields with dogs, that chased, frightened and injured his stock. The plaintiff being a farmer and dealer in cattle, and the defendants keeping hounds, and frequently indulging in the sport of hunting. On the trial in the lower court, the defendants were found not guilty. But the verdict is so palpably against the law and the evidence, that even the attorneys for appellees seem in their brief rather to concede that it ought to be set aside, unless the reasons urged against it are sufficient to cure the error.

First, that these hunters who kept their packs of hounds, at the time of committing the trespasses complained of, were hunting wolves, and therefore had a right to pursue the game with their dogs into and through the plaintiff's enclosures, against his objections. We shall not enter upon the assumed difficult task proposed by appellees to the opposite counsel of producing "some authority against the right of any person to pursue wolves or other animals *feræ naturæ*, and dangerous to mankind, for the purpose of their destruction, across the enclosed fields of another"—although it is said to have been "one of the main legal questions mooted before the jury," and it appears was the idea acted upon by the defendants in their treatment of the plaintiff's possessions; but shall rest content with a single observation upon the subject, that whenever the law shall be so construed as to permit parties to trespass with impunity on the enclosures of their neighbors under such a plea, the fundamental principles upon which it is based should be so changed as to read, that every man shall be protected in the enjoyment of his property, except in cases where hunters, with their hounds, may desire

Glenn v. Kays et al.

to make use of it in the pursuit of game that is considered dangerous.

Secondly, that appellant in waiving instructions by the court to the jury on the trial of the cause, constituted the jurors, arbitrators between the parties, and he can not for that reason assign any error of law as applicable to the evidence which may have been committed in finding the verdict. We think this position equally untenable. It could with as much propriety be said that where the parties waive a jury and try the cause before the court, neither can assign for error that the finding was against the law and the evidence, for as in such cases no instructions are usually asked by either party, therefore they by implication constituted the judge that tried the cause an arbitrator to forever settle unreviewable the disputed matters between them.

The plaintiff certainly, by the mere act of waiving instructions, lost none of his rights to a proper verdict if it was legally incorrect, and when it turned out that the jury had mistaken the law, or failed to make a correct application of the evidence to its principles, the court should without hesitation have set it aside and granted a new trial.

Again it is insisted that the settled practice in this State is not to award a new trial for the purpose of allowing a party to recover vindictive or mere nominal damages. This is doubtless the established practice. But it is quite apparent from the record in the case before us, that the appellant was seeking to recover for substantial injuries, and perceiving no reason to prevent him from so doing, we think the case ought to be submitted to another jury, where the parties will be afforded an opportunity to have the jury properly instructed upon the law of the case. The judgment is therefore reversed and the cause remanded.

Judgment reversed.

City of Joliet v. Tuohey.

THE CITY OF JOLIET

V.

MATTHEW TUOHEY.

1. **COLLECTION OF TAXES—ORDINANCE GRANTING AUTHORITY TO COLLECTOR.**—The City of J., by ordinance, authorized the collector of taxes to complete the collection on warrants for city taxes, where the same were in his hands at the expiration of his term of office. *Held*, that the only effect of such ordinance, even if the city had power to so ordain, would be to extend the time of the performance of those duties which the collector should have performed during his term of office. It does not change the powers, duties or compensation of the collector.

2. **ADDITIONAL COMPENSATION—STATUTORY RESTRICTIONS.**—The statute provides the manner in which the fees of officers should be fixed by the City Council, and the salary of the collector being fixed in this manner, and he continuing to act as collector, by virtue of the ordinance, he was precluded by it from ever receiving any other compensation than that prescribed. He was bound to perform all the duties incident to the office, and the rule is the same, even though additional duties should be imposed upon him by statute or ordinance duly passed subsequent to his election.

3. **ESTOPPEL BY ACTS IN PARS.**—Appellee claimed pay for extra services in making collection of taxes and returning delinquent lists, and insisted that his term of office having expired he was no longer collector, and the city was bound to pay what his services were reasonably worth. To support this claim, appellee must necessarily rely upon the power granted him by the ordinance, and viewing that as only an extension of time in which to complete the collection of taxes, appellee was still the collector, acting under the authority of his original election. He held himself out to the people as collector, received their money for taxes, and retained his fees as such, and he should not now be heard to say that he was not. He is estopped from denying his official character.

4. **NO COMPENSATION FOR PERFORMING A LEGAL DUTY—ULTRA VIRES.**—A subsequent ordinance adopted by the city required, the collector to return the warrants and a list of delinquent taxes, and provided that a reasonable compensation for making a delinquent list should be paid him. *Held*, that the law having imposed this duty upon him as city collector, the city council had no power to allow him extra compensation therefor, as it is prohibited by the statute.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

Mr. D. P. HENDRICKS and Mr. C. A. HILL, for appellant;

City of Joliet v. Tuohey.

contending that officers of a municipal corporation are deemed to have accepted their offices with knowledge of and reference to the compensation therefor, and that there is no implied assumpsit on the part of such corporations with respect to the services of its officers, cited Dillon on Mun. Cor. § 169; City of Decatur v. Vermillion, 77 Ill. 315; Alexander Co. v. Myers, 64 Ill. 37.

That an acting officer is estopped to deny the validity of his own appointment and election: State v. Sellers, 7 Rich. Lew. 368; State v. Mayberry, 3 Strob. 144; Mapes v. The People, 69 Ill. 523; Dillon on Mun. Cor. § 176.

Messrs. HALEY & O'DONNELL, for appellee; argued that where a municipal officer is required to perform a certain service, and no compensation is provided for such service, he is entitled to a reasonable compensation therefor, and cited. People ex rel. Hilton v. Supervisors, etc. 12 Wend. 257; Bright v. Supervisors, 18 Johns. 241; White v. Polk county, 17 Iowa 413; Doubleday v. The Clerk, etc. 2 Cow. 533.

That municipal corporations have power to make contracts for the purpose of carrying into effect the object of their incorporation: Pullman v. Mayor, etc., 54 Barb. 169; People v. Swift, 31 Cal. 26; Meech v. City of Buffalo, 29 N. Y. 198; Roun v. Cabot, 28 Ga. 50; Tucker v. Virginia, 4 Nev. 20; Miller v. Milwaukee, 14 Wis. 642.

PILLSBURY, J. Appellee was elected city collector for the city of Joliet, in March, 1874, and after qualifying entered upon the duties of his office.

As such collector, he received the general tax warrant for such city and various warrants for the collection of special assessments for local improvements. These he held at the time his term expired, which was, as he states in his testimony, July 5th, 1875. February 4th, 1875, the city council passed the following ordinance:

"Be it ordained by the common council of the city of Joliet, that Matthew Tuohey, who was elected to the office of city collector at the annual municipal election, held on the 3rd day of

City of Joliet v. Tuohey.

March, A. D. 1874, for the ensuing year and who qualified and gave bonds as such collector, be and he is hereby authorized as such collector, to complete the collection of the warrants for the collection of the general city taxes for the year A. D. 1874, and all special assessments and taxes, where the warrants for the collection thereof may come into his hands prior to the time and date of the legal qualification, the acceptance and approval of the bond of his duly elected successor in office, and that said Tuohey shall have full power to levy and collect such general taxes and special assessments and taxes in accordance with the law for the collection of special assessments and taxes in and for said city."

Tuohey retained all such warrants after the election and qualification of his successor, from time to time making collections thereon until October 4th, 1876, when the following ordinance was adopted by the city council:

"Be it ordained by the city council of the city of Joliet:

"Section 1. That Matthew Tuohey, late city collector, be and is hereby ordered and directed to immediately make return to the county treasurer, *ex-officio* county collector of the county of Will, and State of Illinois, of the unsatisfied warrant in his hands for the collection of the revenue of the year A. D. 1874, and to make return of all delinquent lands and lots, and pieces and parcels thereof, and the taxes remaining unpaid thereon, with directions to the said county treasurer, *ex-officio* county collector, to immediately advertise said delinquent lands, lots and pieces and parcels of the same, as the law directs, and to apply to the county court of Will county, State of Illinois, at the next November term thereof, for judgment against the same in due form of law."

"Section 2. That said collector shall be entitled to a reasonable compensation for making the said delinquent list and returns to said county treasurer, *ex-officio* collector."

In accordance with the requirements of this ordinance, Tuohey made out such delinquent list and filed the same with the county collector.

He now brings this suit against the city of Joliet to recover for sixteen months' labor collecting taxes at \$60 per month,

City of Joliet v. Tuohey.

and for making delinquent lists in July, 1875, to the city council, and to the county collector in October, 1876, for which he charges in his bill of particulars the sum of \$400. The common counts only were filed by him, to which the city pleaded the general issue and set-off. The plea of set-off was subsequently withdrawn, and the cause tried upon the general issue. Appellee recovered verdict and judgment for \$800, and the city appeals.

The appellee claims that by an ordinance of the city he was required, as collector, to make report to the city council of the delinquent lands and personal taxes of 1874, which he did, and then by the above quoted ordinance of October 4, 1876, he was further required to make and file a delinquent list with the county collector, and as such was no part of his duty as city collector, he is entitled to recover extra compensation therefor.

He further claims that the collection of the taxes after July 5, 1875, was no part of his duty, and, therefore, he is entitled to recover a reasonable compensation for the sixteen months he was engaged in collecting such taxes.

Upon these two grounds he bases his rights to recover.

On the seventeenth day of February, 1874, the city council passed an ordinance fixing the salaries of city officers, in which it was provided, "That the collector receive two per cent. on all moneys actually collected."

The report of appellee to the city council of general taxes and special assessments, collected and delinquent, shows that this model tax-gatherer not only retained the two per cent. upon what he collected, but in every case charged his commission upon the face amount of the warrant.

For instance, the general tax warrant amounted to \$85,667.08, of which he returned \$21,033.92 as delinquent, and yet credits himself with, and retains the fees for collection, on the whole amounts of the warrant, the fees amounting to \$1,713.34.

Again, warrant No. 10, for constructing sewer on Chicago and Jefferson streets was for \$8,872, which he charges himself with and credits himself with amount of delinquent list uncollected \$8,691, and by fees for collection, \$177.44.

He managed to collect on this warrant \$181, and charged the

city \$177.44 for it, and retained his fees out of general taxes in his hands.

Warrant No. 8, for opening Ross street amounted to \$3,079.15. Before Tuohey collected any of it, the whole assessment was dismissed by city council, yet he charged the city \$61.50 as collector's fees and retained it out of general funds.

The aggregate of warrants received by him as collector, was \$99,631.93, upon which he charged and received two per cent. amounting to \$1992.63, at the same time returning as delinquent, abated and dismissed the sum of \$33,701.56. This summary shows that he has already received \$674 more than he was entitled to under the provisions of the ordinance fixing his salary, and yet he comes into a court of law, and asks that he may have another chance at the city treasury.

Under such circumstances, the claim of the appellee does not appeal very strongly to the favorable consideration of a court of justice.

He is entitled to the cold steel of the law, nothing more.

The only authority of appellee to retain the warrants and proceed with the collection of the taxes after his term expired, was the ordinance of February 4th, 1875.

We shall not stop to inquire whether the city council had the power to pass the ordinance in question.

If it did, the ordinance can have the effect only of extending the time for the performance of those duties which he should have done during his term of office. It does not purport to change the powers, duties or compensation of the collector.

If the city did not possess the power to enact such an ordinance, then it is void for want of such power, and the city can interpose the plea of *ultra vires* as a perfect defense to the claim of appellee. Dillon on Municipal Cor. Sec. 381.

The appellee, however, relies upon the doctrine, as he must necessarily do, that the city council had the power to extend the time for him to complete the collections of the warrants, thereby in effect extending his term of office.

Upon this view of the case, he was still the collector, acting under the authority of his original election, and the fact that he accepted the provisions of said ordinance, continued acting

City of Joliet v. Tuohey.

as such collector and retained the fees allowed by law, shows conclusively that he considered he was still collector.

He held himself out to the people as collector, received their money for taxes and retained his fees as such, and now he shall not be heard to say that he was not. We are of the opinion that he is estopped from denying his official character.

By an act of the General Assembly in force April 23, 1873, Rev. Stat. 1874, page 252, it is provided that:

“It shall and may be lawful for the common council or legislative authority of any city in this State to establish and fix the amount of salary to be paid any and all city officers, as the case may be, except members of such legislative body, in the annual appropriation bill or ordinance made for the purpose of providing for the annual expenses of any such city, or by some ordinance prior to the passage of such annual appropriation bill or ordinance; and the salaries or compensation thus fixed or established shall neither be increased nor diminished by the said common council or legislative authority of any such city after the passage of such annual appropriation bill or ordinance, during the year for which such appropriation is made, and no extra compensation shall ever be allowed to any such officer or employe over and above that provided in manner aforesaid.”

Under this statute, the salary of appellee was fixed, and as he continued to act as city collector, as we have seen, he is prohibited by it from ever receiving any extra compensation over and above that provided.

He is bound to perform all the duties incident to the office for the compensation fixed, and the rule is the same, even though additional duties should be imposed upon him by a statute or ordinance duly passed subsequent to his election, and the time his compensation was fixed. *City of Decatur v. Vermillion*, 77 Ills. 315.

If appellee was not satisfied with the two per cent. upon moneys actually collected, he was under no obligation to accept the office with inadequate compensation.

He voluntarily accepted the office knowing what pay he was to receive and on the same terms accepted the provisions of the

ordinance extending the time for the completion of his duties.

The delinquent lists returned by him to the common council were made under the provisions of an ordinance in force at the time of his election, defining the duties of collector and was clearly one of the duties assumed by him at the time of his acceptance of the office. The lists returned by him to the county collector in October 1876, he claims were so made and returned under the provisions of the ordinance of Oct. 4th 1876, the second section of which allowed him reasonable compensation therefor.

This ordinance imposed no additional duties upon appellee, but simply required him to *immediately* make the return to the county collector, that he should have done long prior to that date.

Section 4 of Article 9, of the Constitution of 1870, provides that "The General Assembly shall provide in all cases where it may be necessary to sell real estate for the non-payment of taxes, or special assessments for State, county, municipal, or other purposes, that a return of such unpaid taxes, or assessments, shall be made to some general officer of the county having authority to receive State and county taxes; and there shall be no sale of said property for any of said taxes, or assessments, but by said officer, upon the order or judgment of some court of record."

The Legislature, for the purpose of complying with such requirements of the Constitution, by Act of May 3, 1873, Rev. Stat. 1874, p. 887, Sec. 178, enacted that:

"Where any special assessment made by any city, town or village pursuant to its charter, or by any corporate authorities, commissioners or persons pursuant to law, remain unpaid in whole or in part, return thereof shall be made to the county collector, on or before the tenth day of March, next after the same shall have become payable, in like form as returns are made for delinquent land tax."

Even before this legislation, the return of delinquent taxes and special assessments must be made to the county collector, or no sale could be had. *Hills v. City of Chicago*, 60 Ill. 86.

The law then, having imposed this duty upon him as city

 Guill et al. v. Hanny.

collector, the city council had no power to allow him extra compensation, as it is prohibited from so doing by the statute. *City of Decatur v. Vermillion*, 77 Ills. 315.

It is urged however, in this case, that as the city withdrew its plea of set-off, no credit should be given for the amounts retained by the appellee.

A plea of set off was not necessary. The evidence clearly establishes the fact that the appellee retained as his compensation a much larger amount than he was entitled to. He made his report to the council of the amount received by him, the amount collected and paid to the city treasurer, and as another proof of the looseness with which our municipal affairs are conducted, the council approved his report and allowed him to retain as his fees the whole amount.

It was therefore payment, and payment can be shown under the general issue.

The appellee has shown no right to recover, therefore the judgment of the court below will be reversed.

Judgment reversed.

1	490
66	72
1	490
67	277

 JOHN M. GUILL ET AL.

V.

FRANCISKA HANNY.

1. HUSBAND AND WIFE—EARNINGS OF HUSBAND AS AGENT OF HIS WIFE.—The statute of 1874, in relation to the rights of married women, has not enlarged their rights to the extent that a wife can appropriate the results of the husband's labor and skill, in a business carried on in her name, so as to prevent his creditors from obtaining the benefit of it, as a means of collecting their debts.

2. WHERE THE WIFE EMBARKS IN BUSINESS AND EMPLOYS HER HUSBAND AS AGENT.—If the wife furnished the original capital to commence the business, and the husband conducted it, and through his labor and skill had contributed largely to increase the capital stock, the additions so made do not become the separate property of the wife so as to be beyond the reach of the husband's creditors. It is not the wife's property, but the proceeds of the husband's labor and skill that the creditors have a right to claim.

3. INTERMINGLING OF GOODS. — Where the changes of the material

Guill et al. v. Hanny.

originally purchased, produced by the labor and skill of the husband, have become so interwoven with the capital of the wife as to render identification impossible, the wife loses the right to reclaim her property, or, more correctly speaking, the transaction may be regarded, so far as concerns the creditors, as a loan of the wife's money to her husband, by means of which he engaged in trade.

4. INSTRUCTIONS—MUST BE BASED ON EVIDENCE.—Instructions should be based upon the evidence, and it is error not to confine them to the testimony in the case.

APPEAL from the Circuit Court of Peoria county: the Hon. JOSEPH W. COCHRANE, Judge, presiding.

Messrs. JAMES & JACK, for appellants; upon the question of refusal of defendant's instructions, cited Wortman v. Price, 47 Ill. 22; Brownell v. Dixon, 37 Ill. 197; Wilson v. Loomis, 55 Ill. 352.

That if a wife places her money in the hands of her husband to be used by him in trade, it is virtually a loan to him and his stock in trade would be liable for his debts: Wortman v. Price, 47 Ill. 22; Blood v. Barnes, 79 Ill. 437; Dean v. Bailey, 50 Ill. 481.

Mr. S. D. PUTERBAUGH, for appellee; that a wife may employ the aid of her husband in the management of her separate estate without subjecting it to the payment of his debts, cited Primmer v. Clabaugh, 78 Ill. 94; Dean v. Bailey, 50 Ill. 481; Blood v. Barnes, 79 Ill. 437.

SIBLEY, J. The principal question arising in this case is whether the revised laws of 1874 have changed the doctrine established in Brownell v. Dixon, 37 Ill. 198, and approved in Wortman v. Price, 47 Ill. 22, and Wilson et al. v. Loomis et al. 55 Ill. 352, under the act of 1861, in relation to the subject whether the continued earnings of the husband can be appropriated to the increase of the wife's capital at the expense of his creditors.

The facts are that the property levied on, consisting of the contents of a wagon shop, by the creditors of Richard Hanny in July, 1876, was replevied by the appellee in this suit on the following September, claiming the same as her separate

Guill et al. v. Hanny.

property. Mrs. Hanny testified on the trial of the cause that she borrowed of one Granville James \$500, for the purpose of purchasing a stock of groceries in order to furnish her husband, Richard, who was then largely in debt, with some employment. Mr. Hanny, as her agent made the purchase, and after it was made, conducted and controlled the business (she having little or nothing to do with it), for about six months, when the store was sold out and the amount realized from the sale invested in the business of manufacturing wagons and buggies. The preparation and prosecution of which was left entirely to the husband's judgment.

The stock on hand at the time of the levy was worth from \$900 to \$1,000. She says that the grocery was sold out because Mr. James thought they were not doing well in the business, and proposed that Mr. Hanny should go to work at his trade of wagon-making, which proposition she agreed to, and took the proceeds arising from the sale of the grocery and invested it in this enterprise, her husband still continuing to manage and control this new business as her agent. Mrs. Hanny's testimony is very loose and unsatisfactory, to say the least of it, and in some instances contradictory. She says that she personally borrowed the money of James, and no one else was present when she gave her note, except his wife. Afterward, when pressed, admits that her husband may have signed the note for her; which turns out from the testimony of James to be the fact, and that her husband was present at the time. She also says that the money was borrowed two or three days previous to purchasing the grocery. Yet it appears that the goods were purchased in September, and the note was dated in April. Her testimony respecting the \$570 which she received from Germany in 1869 is too vague and inconclusive to be of much weight. She would not use it in purchasing the grocery, because she was saving it for her children, and preferred to borrow at a high rate of interest rather than to take the chances of losing her own money in a business with which she was unacquainted. What became of this money does not very clearly appear. She said at the time of the trial that she "had not got it all any

Guill et al. v. Hanny.

more." How it had diminished is not important, since she does not say that any portion of it was ever put into the business managed by her husband, although the impression seems to have been conveyed to the jury that she had done so. The record, however, fails to furnish any evidence of it. Then again, Mr. James was extremely accommodating to loan this \$500 to Mrs. Hanny, who had no property except a little money that she was saving for her children, and refused to risk it in the business that she wished to engage in, without any security, relying, as she says, upon the expectation of its being repaid by means of the husband's earnings. It may here be remarked, that if it was, as they all agree, except the husband, who for some reason was not produced as a witness on the trial, understood his earnings were relied upon for the repayment of the money loaned to furnish the capital, how could the business be considered the wife's separate property, when her services had contributed nothing to its profit?

According to Mrs. Hanny's testimony, she was present when the contract for purchasing the grocery was made, and paid the purchase money. But the witness DeWorth, who was in possession of the establishment, and Mesterschmidt, the real owner of it, both swear that the sale was made to Richard Hanny, and that his wife was not present at the time, nor was her name mentioned in the transaction. DeWorth also states that Mr. Hanny gave him a check on the bank to pay for the property.

The first time that either of them speak of seeing Mrs. Hanny was after the contract had been closed and an account of stock was being taken. Mesterschmidt says that two or three days after the matter was closed up, he saw the name of Mrs. Hanny on the sign as proprietor of the store; inquired of Mr. Hanny what it meant, and was informed by him that he had a difficulty with one Hughes, and just as soon as he had settled that, he would run the business in his own name.

This whole case has so much the appearance of an effort on the part of the principal parties interested to establish the husband of appellee in a business where his earnings and the fruits of his labors were to be placed beyond the reach of his creditors

Guill et al. v. Hanny.

for an unlimited time, that it should receive no favor from either courts or juries.

Mrs. Hanny testified that there was no agreement as to what her husband was to receive by way of compensation for his services in attending to her business, except "that he was to be paid as the business would pay," until about the time of the levy upon the property, when it was understood that he was to have \$1.50 per day for his labors. On cross-examination, she was asked whether she had ever paid her husband anything on account of his services, and the Court refused to permit her to answer the question. In this, we think, the Court erred. To show the real nature of the transaction between the husband and wife, it was eminently proper to ascertain (if he was acting as her agent only in transacting the business) whether he had ever received any, or what, compensation for his labor.

Instruction No. 4, given for the plaintiff as follows:

4. "That if the jury find from the evidence that plaintiff had \$570 in her own right, derived from a source other than her husband, and that on her own name and credit she borrowed \$500, and with these sums she purchased stock and engaged in the business of manufacturing wagons, and that no part of the capital used in such business was furnished by her husband and that defendants, as constables, by virtue of executions in their hands against Hughes and Hanny, the husband of the plaintiff, seized and took the property of plaintiff so purchased and manufactured by her, you will find the defendants guilty, and the property so seized and taken in the plaintiff," was erroneous, for the reason there was no evidence in the case tending to show that Mrs. Hanny *ever* put any amount of money into the business of manufacturing wagons, which she owned in her own right, except the proceeds derived from the sale of the grocery; much less the sum of \$570 in addition to it. She says that she put into that business the \$500, realized from the sale of the grocery; no other sum is mentioned by her at all.

Instructions should be based upon the evidence, and it is error not to confine them to the testimony in the case. *Goodwin v. Durham*, 56 Ill. 239; *Holden v. Hulbert*, 61 Ill. 280;

Guill et al. v. Hanny.

Paulin v. Howser, 63 Ill. 312; Alexander v. Town of Mt. Sterling, 71 Ill. 366; Ill. 463; Murphy v. Larson, 77 Ill. 172. This instruction, as well as No. 5, is also liable to another objection; that is, if the wife furnished the original capital to commence the business, and the husband conducted it, and through his labor and skill had largely contributed to increase the stock; still this addition to the capital, the jury were instructed, was so far beyond the reach of his creditors as not to be liable to seizure. It was said in Wilson et al. v. Loomis et al. *supra*, "that if she could thus appropriate the results of her husband's labor, industry and skill to herself as separate estate for a number of years, no reason is perceived why she should not do so for an entire lifetime."

We do not think the law as settled in that and the previous decisions upon the same subject is at all in conflict with the cases referred to by appellee. Primmer v. Clabaugh, 78 Ill. 94; and Blood v. Barnes, 79 Ill. 437; simply uphold the doctrine that the wife by merely allowing her husband to manage her property does not forfeit her right to it. This does not militate against the former decision upon the question in controversy. For in these cases the identical articles of property in dispute belonging to the wife were the only subject of question. Hence while the farm in the one case, and the printing press in the other owned by the wife, could not be taken for the husband's debts, it was conceded that the crops raised upon the land by the husband's labor would, after the payment of a reasonable rent, be liable to seizure by his creditors for the satisfaction of his debts. It is not the wife's property but the proceeds of the husband's skill and labor that the creditors have a right to claim. In the present case, there was no proof that any of the stock on hand at the time of the levy included articles that were purchased by the money of the wife in the first instance. The changes of the material originally purchased that were produced by the labor and skill of the husband had been so interwoven with the capital of the wife as to render any identity quite impossible. Then the familiar rule that one who willfully mixes up his property with that of another so as to destroy its identity, loses his

 Bannon v. The People.

right to reclaim it, seems to have some application in cases like the present, although it may be more correct to say, as is said in *Wortman v. Price, supra*, that "the transaction can only be regarded, so far as concerns the creditors, as a loan of the wife's money to her husband, by means of which he engaged in trade." It is, however, insisted that since the decisions referred to were made, the revised laws of 1874 have enlarged the rights of married women to such an extent that they can now transact business in the same manner as if they were sole and unmarried. That the husband is not liable for the debts of his wife except in certain cases nor is she in any way responsible for his. But can it be supposed the Legislature meant that either could appropriate the other's labor and skill so as to prevent their separate creditors from obtaining the benefit of it, as a means of collecting their honest debts. This would be attributing to the law-makers a motive that cannot be supposed to have existed. Indeed the law itself is careful to provide that neither the wages nor the earnings of the one, shall be liable for the separate debts of the other, clearly indicating that such labor and skill should remain intact for the purpose of enabling each to discharge their own separate liabilities; and nothing appears in the law pointing to an intention to change the doctrine as it had previously been established by the Supreme Court.

For the reasons indicated, the judgment of the Circuit Court will be reversed and the cause remanded.

Judgment reversed.

EDWARD BANNON, Impl'd, etc.

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. JURISDICTION TO RENDER JUDGMENT.—MAY BE QUESTIONED COLLATERALLY.—Where a court has jurisdiction of the subject matter and of the person, the judgment is binding and conclusive, and cannot be questioned in any collateral proceeding, however erroneous it may be, but if such

Bannon v. The People.

jurisdiction in either particular be wanting, the judgment is a nullity, and can be attacked by any one affected by it in any and all proceedings either direct or collateral.

2. **PRESUMPTION OF JURISDICTION.**—Where there is no special finding of the Court, the presumption of jurisdiction must be consistent with the record, for the court will be presumed to act upon and acquire jurisdiction from the facts alone as they appear in the record, and if these are insufficient to confer jurisdiction, the presumption will be overcome and the judgment held void.

3. **JURISDICTIONAL FINDING BY THE COURT.**—WHAT MUST APPEAR IN THE RECORD.—But where the court adjudges that it has jurisdiction over the person, it is not enough, to destroy it, that the record itself is insufficient to support such finding, for it will be presumed that the court heard other evidence not necessary to present in the record, or that it acquired jurisdiction in some other manner than that stated. In such cases, before such finding can be impeached, or the jurisdiction destroyed, the record must show affirmatively that such finding cannot be true.

4. **JUDGMENT BY CONFESSION—POWER OF ATTORNEY CONFERS JURISDICTION.**—A power of attorney in a note, giving authority to enter the appearance in court of a defendant, and confess judgment thereon, when due, and the entry of such appearance, and confession of judgment, is that which confers jurisdiction upon the Court to render judgment. If, therefore, the record shows that at the time of the entry of judgment thereon, the note was not due, it is equally apparent that the attorney had in fact no power to enter the appearance of the defendant, and having no such power, the court failed to acquire jurisdiction of the person, and the judgment is void.

5. **NO CONFESSION OF JUDGMENT UNTIL EXPIRATION OF DAYS OF GRACE.**—A note payable on a certain day is entitled to days of grace, and an entry of appearance and confession of judgment by virtue of a warrant of attorney therein, before the expiration of such days of grace, confers no jurisdiction upon the court, and is void.

6. **EVIDENCE—WARRANT OF ATTORNEY A PART OF THE RECORD.**—Upon confession of judgment upon a warrant of attorney contained in the note, the warrant of attorney becomes a part of the record, to the extent that it may be used in evidence, when offered in a collateral proceeding, as a part of the record, for the purpose of overthrowing the jurisdiction of the court.

7. **ATTACKING JUDGMENT COLLATERALLY.**—So, in a proceeding by several creditors for distribution of funds in the hands of the sheriff, arising from a levy upon property of the execution debtor, on a motion to quash the execution of a judgment creditor, because from the record it appeared that the judgment upon which such execution was issued, was entered by confession before the note was in fact due, it was held that the court did not err in quashing such execution and ordering a distribution of the fund without regard to such execution.

8. **PRACTICE—SETTING ASIDE JUDGMENT AFTER LAPSE OF A TERM.**—Where the parties to a judgment entered by confession, were satisfied, and did not solicit the aid of the court in that regard, it was error for the court to set aside such judgment after the lapse of a term.

Bannon v. The People.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

Messrs. HALEY & O'DONNELL, for appellants; argued that where a judgment is entered by confession in open court, the note and power of attorney are not a part of the record, and cited *Magher v. Howe*, 12 Ill. 379; *Starburg v. Eaton*, 47 Me. 596; *Storer v. White*, 7 Mass. 448; *Pierce v. Adams*, 8 Mass. 383; *Hodges v. Ashurst*, 2 Ala. 301; *Cory v. Russell*, 3 Gilm. 367; *Edwards et ux. v. Patterson*, 5 Gilm. 126; *McDonald v. Arnout*, 14 Ill. 58; *Smith v. Wilson*, 26 Ill. 186; *Freeman on Judgments*, § 78.

That in a collateral proceeding, where the validity of a judgment is questioned, it must be by the record of the judgment itself, and evidence *de hors* the record is not admissible: *Thompson v. Morris*, 57 Ill. 333; *Gassett v. Howard*, 10 Q. B. 453; *Withers v. Patterson*, 27 Texas, 491; *Holmes v. Campbell*, 12 Minn. 221; *Spaulding v. Baldwin*, 31 Ind. 376; *Evans v. Ashby*, 22 Ind. 15; *Butcher v. Bank of Brownsville*, 2 Kan. 70; *Reynolds v. Stansburg*, 20 Conn. 344; *Rigg v. Cook*, 4 Gilm. 336; *Voorhees v. Bank of U. S.* 10 Pet. 449; *Freeman on Judgments*, § 124.

That all presumptions are in favor of the validity of judgments of courts of general and superior jurisdiction: *Freeman on Judgments*, § 124; *Withers v. Patterson*, 27 Texas, 491; *Holmes v. Campbell*, 12 Minn. 221; *Osgood v. Blackmore*, 59 Ill. 261; *Bush v. Hanson*, 70 Ill. 480; *Martin v. Judd*, 60 Ill. 78.

That where the appearance of the defendant is entered by an attorney, the Court will presume that the attorney had authority, and in a collateral proceeding such presumption is conclusive: *Freeman on Judgments*, § 128; *Martin v. Judd*, 60 Ill. 78; *Harshy v. Blackmarr*, 20 Iowa, 161; *Jackson v. Stewart*, 6 Johns. 34; *Brown v. Nichols*, 42 N. Y. 26; *Hamilton v. Wright*, 32 N. Y. 502; *Proprietors v. Bishop*, 2 Vt. 231; *Post v. Haight*, 1 How. 171; *Hillsbury v. Dugan*, 9 Ohio, 117; *Hays v. Shattuck*, 21 Cal. 151; *Williams v. Butler*, 35 Ill. 544; *Osborn v. Bank of U. S.* 9 Wheat, 738.

Bannon v. The People.

And in the absence of fraud or collusion, the Court will proceed, and leave the party who may be injured by an unauthorized appearance to his remedy by action: Tally v. Reynolds, 1 Ark. 99; State v. Carothers, 1 Greene (Iowa), 464; Beckley v. Newcomb, 24 N. H. 359; Bogardus v. Livingston, 2 Shilt. 236; Conray v. Brenham, 1 La. An. 397; Dobbins v. Dupree, 39 Ga. 394.

Messrs. BROWN & MEERS, Messrs. HILL & DIBELL, Messrs. HAGAR & FLANDERS, Mr. JAMES R. FLANDERS and Mr. GEO. S. HOUSE, for several appellees; contended that a judgment entered when the court had not jurisdiction of the person, is void, and may be attacked in a collateral proceeding; and cited White v. Jones, 38 Ill. 160.

That where a judgment by confession refers to a note and warrant of attorney so that they can be identified, resort may be had to them to determine whether the Court had jurisdiction of the person at the time of rendering judgment: Blackmore v. Osgood, 59 Ill. 261; Chase v. Dana, 44 Ill. 262.

That a judgment prematurely confessed upon a warrant of attorney, is void: Waterman v. Jones, 28 Ill. 54; White v. Jones, 38 Ill. 160.

That the judgment in favor of the People against Michael E. Bannon, for keeping open tippling house, was a lien upon his property, and should be first satisfied: Rev. Stat. 1874, 413, § 453.

In support of cross-errors, that the goods of a tenant taken in execution cannot be distrained, because they are in the custody of the law: Taylor's Land. and Ten. § 594; Coke upon Litt. 47 b.; Rex v. Colton Park, 120; Eaton v. Southby, Willes, 136; Hamilton v. Reedy, 3 McCord, 40.

PILLSBURY, J. Appeal from Will Circuit Court by Edward Bannon from an order of said Court quashing an execution in his favor against Michael E. Bannon, and setting aside the judgment upon which such execution was issued. In the case of the people against said Michael E. Bannon, the State's attorney of Will county moved the court for a rule upon the sheriff

Bannon v. The People.

to show cause why he did not apply moneys in his hands arising from the sale of personal property of the defendant to the payment of the execution in his hands in favor of the people. The rule was entered, and the sheriff, for return thereto, answered that he held several executions against the defendant, Michael E. Bannon, giving date when each was received by him; the second one of which, in point of time, received by him was for \$1,837 in favor of appellant Edward Bannon; that from the sale of personal property of said defendant in executions he had realized the sum of \$750.65 above costs and expenses, and asked the advice of the court as to the proper distribution thereof, as there were conflicting interests among the several execution creditors.

The several execution creditors were notified of the rule and answer, and they appeared in court and contested the validity of the judgment and execution of the appellant, upon the ground that the same were void, the court having no jurisdiction over the defendant, Michael E. Bannon, at time of rendering the judgment. The court quashed the execution, set aside the judgment as void, and ordered the sheriff to make distribution without regard to the execution of appellant. From this order Edward Bannon appealed. This judgment was entered September 12, 1877, in the Circuit Court of Will county, during the June term.

The proceedings herein were had at the October term of said court. On the hearing, the contesting creditors gave in evidence against the objection of appellant the note and warrant of attorney, declaration, cognovit and judgment in case of Edward Bannon v. Michael E. Bannon. The note bears date September 10, 1877, and due one day after date. The warrant of attorney is of the same date, and empowers James R. Flanders, or any attorney of any court of record, to enter the appearance of defendant, and waive service of process, either in term time or vacation, and confess a judgment in favor of Edward Bannon for the sum named in said note, or for so much as may appear to be due according to the tenor and effect of said note, with interest, costs, and attorney's fees, and to file cognovit for the amount, with agreement waiving errors, etc.

Bannon v. The People.

The general principles of the law relative to the validity of judgments depending upon the question of jurisdiction in the court rendering them, are undoubtedly well understood.

Where the court has jurisdiction of the subject matter and of the person, the judgment is binding and conclusive, and cannot be questioned in any collateral proceeding, however erroneous it may be.

On the contrary, if such jurisdiction in either particular be wanting, the judgment is a nullity, and can be attacked by any one affected by it in any and all proceedings, either direct or collateral.

The application of this doctrine of jurisdiction to cases as they arise, is not always as easy as the enunciation of the doctrine itself; indeed an examination of the authorities will show that frequently it becomes a very difficult question to determine whether the court had or had not jurisdiction in a given case.

It results therefrom that the authorities are not harmonious as to how and when the jurisdiction can be overthrown in a collateral proceeding, yet we think that the doctrine is fully admitted, in our State, at least, that the question of jurisdiction is open to inquiry, collaterally, by any one against whom such judgment is used. Thornton, Justice, speaking for the court, in *Haywood v. Collins*, 60 Ill. 328, upon this point, says: "That the validity of a judgment may be questioned in a collateral proceeding, has often been decided by this court."

In *Goudy v. Hall*, 30 Ill. 109, it was decided that the decree of a county court authorizing the sale of land was absolutely void, if the notice required by the statute had not been given, and that its validity might be inquired into when the record was offered in an ejectment suit.

In *Miller v. Handy*, 40 Ill. 449, the court said: "If there was not jurisdiction to render the judgment offered in evidence in defense, then all the proceedings were *coram non judice*, and they may be attacked collaterally in an action of ejectment."

In *Campbell v. McCahan*, 41 Ill. 45, it is said that "there must be jurisdiction of both the subject matter and of the person to give validity to judgments, and if jurisdiction is not

Bannon v. The People.

acquired the judgment is void, and may be resisted successfully, either in direct or collateral proceeding." To the same effect is the case of *White v. Jones*, 38 Ill. 160.

In *Clark v. Thompson*, 47 Ills. 25, it was held that the presumption in favor of the jurisdiction, even of a court of general jurisdiction, may be rebutted in all collateral proceedings; and when there is no finding of the court, the presumption will be that it acted upon the summons and return which do appear in the record.

In *Huls v. Buntin*, 47 Ill. 396, the suit was ejectment, and the defendant claimed title by virtue of a sale by an administratrix under a decree of court. It was held that "if the Court did not have jurisdiction, the decree was not binding, and could be attacked collaterally."

I have quoted at some length from these cases, to show what construction the Supreme Court placed upon its former opinions, in view of the reliance placed upon the case of *Searle v. Galbraith*, 73 Ill. 269, by appellant.

A suit in ejectment by Searle, to recover land sold by his conservator under decree of court, had been prosecuted to judgment in favor of Searle. The judgment was set aside under the statute, and pending a second trial Galbraith filed a bill enjoining the ejectment suit, and asking that Sampson, the conservator of Searle, should make and deliver a deed in conformity with the decree and sale. The decree upon which the sale was made recited that the court found that Searle had been ascertained by a jury to be an insane person, according to the statute, and that Sampson had been appointed his conservator. The case states: "That on the hearing below Searle gave evidence tending to show that he was not served with notice of the proceedings in the county court declaring him insane; and the question arises whether he can be allowed to contradict the findings of the decree, so far as it relates to the appointment of Sampson as his conservator. We do not regard the question as an open one with us, and shall therefore refer to but few authorities. In *Fitzgibbon v. Lake*, 29 Ill. 165, the record of a guardian's sale was offered in evidence by the defendant in an action of ejectment. It

Bannon v. The People.

was urged by the counsel for the appellants, who were plaintiffs in the court below, that there were two testamentary guardians appointed, whereas the record showed but one acting. The Court said: 'The next objection is, that the petitioner could not alone, without joining the other guardian named in the will, properly institute that proceeding. Whether the petitioner was the guardian and had authority to institute the proceeding, was for that court to determine when it heard the petition. It decided he was, by granting the order, and we cannot review that decision here.' "

Goudy v. Hall, 30 Ill. 109, and subsequent cases of like character, only hold that the finding of the court on the question of jurisdiction is not conclusive when the record itself shows it is not true.

The distinction between the two classes of cases is clearly pointed out in Osgood v. Blackmore, 59 Ill. 265. It is there said: "And where the record shows, or the court finds, the jurisdictional fact, the record cannot be contradicted or questioned in a collateral proceeding."

"It is true that if by an inspection of the whole record, it is seen there could not have been jurisdiction of the person, then the *prima facie* case would be overcome. But where the court has adjudged there was jurisdiction of the person, we cannot look beyond the record or receive evidence outside of it to disprove the finding. In this respect the question can alone be tried by the record."

We do not understand from this decision that the court intends to or does overrule all the former cases upon this question, of attacking the jurisdiction, but on the contrary upholds them, and sharply draws the distinction between the cases where the court specially finds that it has jurisdiction, and those where there is no such finding.

This case does not hold that the finding itself is absolutely conclusive, but limits the inquiry to an inspection of the whole record, excluding all evidence *dehors* the record to impeach it. To the same effect is the case of Harris v. Lester, 80 Ill. 307; and Barnett v. Wolf, 70 Ill. 76.

Bannon v. The People.

The rule deducible from all the authorities upon this point appears to be, that where there is no special finding of the court, the presumption of jurisdiction must be consistent with the record, for the court will be presumed to act upon and acquire jurisdiction from the facts alone as they appear in the record, and if these are insufficient to confer such jurisdiction, the presumption will be overcome and the judgment held void. *Clark v. Thompson*, 47 Ill. 26; *Haywood v. Collins*, 60 Ill. 328.

On the contrary, where the court adjudges that it has jurisdiction of the person, it is not enough to destroy it that the record itself is insufficient to support such finding; for it will be presumed that the court heard other evidence not necessary to be preserved in the record, or that it acquired jurisdiction in some other manner than that stated.

In such case, before such finding can be impeached, or the jurisdiction destroyed, the record must show affirmatively that such finding cannot be true. *Osgood v. Blackmore*, 59 Ill. 261; *Miller v. Handy*, 40 Ill. 448; *Harris v. Lester*, 80 Ill. 307; *Barnett v. Wolf*, 70 Ill. 76.

What, then, constitutes the record into which the court will look to determine the jurisdiction when the judgment is offered in a collateral proceeding?

Upon this point we shall refer to that class of cases only where judgments by confession have been involved and the question raised collaterally, for if we follow the course marked out by our Supreme Court, we shall not go astray.

In *White v. Jones*, 30 Ill. 162, the action was replevin, and the defendant justified as sheriff under execution issued upon a judgment confessed, the plaintiff in replevin claiming as purchaser from the execution debtor. The note upon which judgment was confessed was made payable upon demand, and it, as also the warrant of attorney, bore date November 20. The warrant of attorney authorized confession of judgment at any time after the date thereof, and judgment was in fact confessed on the same day the warrant was dated. Execution was issued thereon and levy made, upon which replevin was brought. After referring to the fact that the judgment had been reversed

Bannon v. The People.

in a direct proceeding because it was prematurely confessed, the court said: "The confession being unauthorized at the time it was made, the question arises whether it was merely erroneous or absolutely void. As a rule of general, if not uniform, application, a judgment is void for all purposes, unless the court had jurisdiction of the person of the defendant, and of the subject matter of the suit."

"And jurisdiction is acquired by the actual service of process notifying the party to appear, by constructive notice to appear, as by publication, or by an entry of appearance by himself in person, or by attorney. In the last case the authority of the attorney to enter his appearance may be contested by the defendant, and if he shows a want of authority it defeats the jurisdiction of the court." * * * *

"If the court acquired jurisdiction of the defendants it was by an entry of appearance, as there is no pretense of either actual or constructive service. And it appears from the power of attorney itself, that the attorney had no power to enter their appearance until after the expiration of the day on which the warrant was executed; and there can be no pretense from anything else appearing in this record that there was any other legal authority. For the want of authority there was no appearance, and consequently no jurisdiction, and the judgment was void, and all subsequent proceedings under it were invalid, and conferred no rights upon the plaintiff in that judgment. The execution consequently, created no lien upon the goods."

Chase v. Dana, 44 Ill. 262, was ejectment, the defendant claiming title to the premises by a sale under an execution and a judgment confessed by virtue of a warrant of attorney executed by the plaintiff. The power of attorney, the note, judgment, execution and sheriff's deed, were all read in evidence. The note was described in the power of attorney as bearing date April 24th, 1846, and authorized a confession upon note of that date. The note upon which the judgment was confessed bore date April 24th, 1856. The court say:

"In this case the authority was to enter the appearance of the maker and confess judgment upon a note bearing one date,

Bannon v. The People.

while the appearance was entered and judgment entered on a note dated ten years afterward. This was manifestly not within the power delegated; and if there was no power to enter the appearance and confess the judgment, it is a nullity, and binds no one, either in a direct or collateral proceeding, but may be attacked at all times, and in all courts, because the court must in some mode have jurisdiction of the defendant, or it cannot act."

In both of these cases the court held the confessed judgments void, and no question is made that the warrant of attorney was not competent evidence to be considered in determining the jurisdiction of the court over the person of the defendant. It is however insisted that the confessions in these two cases were in vacation, and therefore the jurisdiction should affirmatively appear. The confession in *White v. Jones* was in vacation, but the case is silent in *Chase v. Dana* on that point. Even if it were so in regard to those cases, the confession in *Osgood v. Blackmore* was in term time, and attacked in an action of ejectment, and the same doctrine was held upon a full examination of the note and warrant of attorney; and it is not even intimated that the warrant of attorney was not sufficiently a part of the record to be given in evidence when the question of jurisdiction was in issue. In that case the case of *Chase v. Dana* was relied upon, and no difference is made between the cases upon the point that one was confessed in term time and the other in vacation. In that case the note was payable in thirty days after written notice, with ten per cent. interest per annum, while the warrant of attorney in other respects described the same note, but said that it was payable with ten per cent. interest after it became due and payable, and it was urged that the note upon which the judgment was rendered was not the one referred to in the power of attorney.

The Supreme Court, after deciding that it sufficiently appeared that it was the same note, held that "had the power of attorney left it clear that the note produced was not that referred to in the warrant, then the power could not have been exercised."

It was also claimed in that case, that as the record did not

Bannon v. The People.

show that the written notice had been given thirty days before the confession was made, and as there was no finding of the court that such notice had been given, the court could not presume the proof was made.

The court, after again announcing the doctrine that all intendments will be indulged in favor of the jurisdiction of a court of general jurisdiction, and that the presumption is that the proof was made when there is nothing in the record to rebut such presumption, said:

“Had the record stated that no proof was heard as to any notice having been given, then the presumption would have been rebutted. Or had it appeared from the record that the note was not and could not have been due, the record would have shown that the attorney in fact had no power to enter the appearance of the defendants, and having no power, the court would have failed to acquire jurisdiction of the persons of the defendants, and the case would have been like *Chase v. Dana supra.*”

When we consider that the objection was made to the introduction of the warrant of attorney on the trial of the ejectment case in the court below, on the specific ground that it was no part of the record of the cause, and that on the appeal the Supreme Court fully examined its provisions for the purpose of determining the question of jurisdiction, and held as the law of the case, that the power could not have been exercised if the warrant of attorney had left it clear that the note introduced was not the one referred to in the warrant, the conclusion is irresistible that this case of *Osgood v. Blackmore* is a direct adjudication by the highest judicial tribunal in this State, that the warrant of attorney referred to in the judgment order, can be introduced in evidence, in a collateral proceeding as a part of the record for the purpose of overthrowing the jurisdiction of the court.

We have been unable to find a single case in our reports, where the warrant of attorney has been excluded when offered in a collateral proceeding to impeach the judgment upon the ground that it was not competent as being no part of the record; on the contrary it appears to have been treated as the

Bannon v. The People.

process by which the court attained jurisdiction of the person of the defendant, and in every instance where the question has thus arisen when the warrant conferred no power to enter the appearance of the defendant, the judgment has been held void. We can see no good reason why the warrant should not be competent evidence upon such question. The attorney who confesses the judgment does so by virtue of a special authority which is presented to the court and filed in the cause, and under its provisions alone he assumes to confer upon the court jurisdiction over the person of the defendant, and when such jurisdiction is in issue, what better or more satisfactory evidence can be adduced than such special authority itself, signed and sealed by the defendant. All the authorities concede that the law gives any party the right to assail the validity of a judgment, for the want of jurisdiction in the Court rendering it, when it is sought to deprive him of any property rights by enforcing such judgments against him; and it would outrage every principle of justice to hold that while the law gave him such right, it at the same time deprived him of all means of enforcing it.

Take the case at bar: These creditors were not parties to the judgment of Edward Bannon v. Michael Bannon; they could not except to the ruling of the court in entering the judgment upon this warrant of attorney and incorporate it in the record by tendering a bill of exceptions. But suppose it was preserved by bill of exceptions. We are aware of no rule of evidence that would make a bill of exceptions competent evidence in a collateral proceeding between different parties when the subject matter of the bill would not otherwise be admissible. Would the certificate of the judge that the warrant was the one upon which the judgment was confessed, give it any greater weight or vitality as evidence, than it would have if properly identified by any other competent evidence?

The cases of Magher v. Howe, 12 Ill. 379, and Waterman v. Caton, 55 Ill. 94, do hold, as claimed by appellant, that the warrant of attorney is no part of the record. These, however, were direct proceedings to reverse upon error judgments entered by confession, where the defendant himself was in a

Bannon v. The People.

position to file a bill of exceptions, and if these cases are to stand as authority in harmony with the other cases referred to, then the rule there announced must be limited to direct proceedings by appeal or writ of error. In no other way can they be harmonized with *Osgood v. Blackmore* and *Chase v. Dana*.

We do not understand the judgment order in evidence in this case contains any special finding of jurisdiction. It merely recites the facts upon which the jurisdiction is based; the filing of the declaration and warrant of attorney reciting that it authorizes any attorney of any court of record to appear in that court and waive service of process and confess judgment for the amount due upon the note annexed to the warrant; and the filing of the cognovit by D. P. Hendricks, confessing judgment upon the note declared on. The finding of the court is, that the authority of the attorney was limited to a confession of what should be due upon the note, and is consistent with the warrant.

There being no finding by the court that it had jurisdiction of the person of the defendant, and no pretense that the attorney had any other or different authority, the presumption must be that the court acted upon the warrant of attorney referred to in the judgment. *Clark v. Thompson*, 47 Ill. 26; *Haywood v. Collins*, 60 Ill. 328; *Swearngen v. Gulick*, 67 Ill. 208.

The warrant of attorney bears date September 10th, 1877, and describes the note as of even date and due one day after the date thereof; the declaration declares upon the same note; the cognovit confesses judgment upon the note described in the declaration, and the judgment order recites that the authority to confess the judgment was limited to the amount due upon the note described in the warrant of attorney and declaration. This judgment was confessed September 12, 1877, consequently the note was not due, as it was entitled to days of grace. *Arnold v. Stock*, 81 Ill. 407.

If this record, then, upon its face, does not show that the court could not have acquired jurisdiction of the person, I shall never expect to find one that cannot stand the test. If it does appear therefrom that the note could not have been due, then, in the language of Walker, J. in *Osgood v. Blackmore*, the

Morris v. Gleason.

record does show that the attorney in fact had no power to enter the appearance of defendants, and having no power, the court failed to acquire jurisdiction of the person of the defendant, and the case is like *Chase v. Dana, supra*.

Our opinion, therefore, is that the court below decided correctly in refusing to allow the execution of appellant to share in the distribution of the funds in hands of the sheriff.

The general power of attorney from appellant to Hendricks, of date of September 1st, 1877, cannot avail to sustain the jurisdiction of the Court. It was not by virtue of that authority that the appearance of appellant was entered, neither was it presented to the court for such purpose, nor does it purport to confer any authority to confess judgment.

We think so far as the questions arising upon the assignment of errors are concerned, that the court committed no error in the rule for distribution.

The court, however, erred in setting aside the judgment after the lapse of a term, when the parties to the judgment, were satisfied with it and did not solicit the action of the court in that regard.

The order of the court vacating the judgment must be reversed, but will be affirmed in all other respects.

Order reversed in part.

NELSON MORRIS, Impl'd, etc.

v.

MARY D. GLEASON, Adm'x.

1. MASTER AND SERVANT—EVIDENCE TENDING TO SHOW WANT OF NEGLIGENCE.—In an action against appellant for the death of one of his workmen, caused by the explosion of a steam boiler belonging to appellant, evidence was offered to show that there was no negligence on the part of appellant, because by the explosion the loss to appellant was \$20,000. Held, that such evidence was properly excluded.

2. DEFECTIVE INSTRUCTIONS—NOT CURED BY OTHERS NOT DEFECTIVE.—In a case of this character, substantially defective instructions of an important character are not cured by others not containing the imperfections.

Morris v. Gleason.

3. **LIABILITY OF EMPLOYER—KNOWLEDGE BY THE EMPLOYEE OF THE DEFECT.**—An instruction as to the liability of an employer, which informs the jury that they may find for the plaintiff if they (among other things) believe from the evidence: that the death was caused by a defect in the boiler, which was known to the defendant; that the deceased was in the exercise of ordinary care; and that the explosion was not caused wholly or in part by the deceased, is erroneous, because it omits to mention also the important fact that the deceased was not aware of the defects which caused the explosion.

4. **NO RECOVERY IF THE SERVANT HAD KNOWLEDGE OF THE DEFECT.**—Although the explosion was not caused by the fault of the deceased, yet if he was aware that the boiler was defective in those particulars which caused it to explode, there can be no recovery, even though the deceased may have exercised the greatest care to prevent the explosion, or to have kept out of the reach of its injurious effects.

5. **DEFECTS FOR WHICH EMPLOYER WILL BE HELD LIABLE.**—In order to make the employer liable for defects known by him to exist, the defects should be of a character which he could by exercising skill have ascertained would be likely to produce the explosion. There might have been defects, and these might have produced the explosion, and they might have been known, and yet they may have been such as no amount of care and caution on the part of the employer would have disclosed to be dangerous and to be guarded against as such.

6. **EMPLOYER NOT AN INSURER OF EMPLOYEE.**—An employer is not an insurer of his employee against accidents from defective machinery. The rule is diligence, perhaps high or in the highest degree; still there can be no liability without some neglect to do that which ought to be done to have the machinery safe.

APPEAL from the Circuit Court of Henry county; the Hon. GEO. W. PLEASANTS, Judge, presiding.

Mr. C. K. LADD and Mr. CHARLES DUNHAM, for appellant; argued that if the deceased had knowledge of defects in the machinery and still continued his work, no recovery can be had for an injury received in the course of such business, and cited *Camp Point Manufacturing Co. v. Ballou*, adm'r, 71 Ill. 417; *C. & A. R. R. Co. v. Monroe*, 9 Chicago Legal News, 375; *T. W. & W. R'y Co v. Moore*, adm'r, 77 Ill. 217; *Sullivan's adm'r v. Louisville Bridge Co.* 9 K'y Ct. App. 81; *Ladd v. New Bedford R. R. Co.* 20 Am. Rep. 332; *Ford v. Fitchburg R. R. Co.* 110 Mass; *St. L. & S. E. v. Britz*, 72 Ill. 256; *Patterson v. P. & C. R. R. Co.* 18 Am. Rep. 415; *Moss et al. v. Johnson*, 22 Ill. 633; *I. B. & W. R. R. Co. v. Flanigan*, 77 Ill. 365.

Morris v. Gleason.

A person entering upon a necessarily dangerous employment takes upon himself the risk incident to such employment. *Wood's Master and Servant*, 758; *Woodley v. Metropolitan R'y Co.* Am. Law T. Oct. 1877; *Gibson v. Erie R'y Co.* 20 Am. Rep. 553; *Lovenguth v. City of Bloomington*, 71 Ill. 238.

The master cannot be held liable simply because he knows the machinery is unsafe, if the servant has the same means of knowledge as the master: *Williams v. Clough*, 3 H. & N. 258; *Wright v. N. Y. Cent. R. R. Co.* 25 N. Y. 566.

If the master has appointed a competent person to make repairs, he cannot be held liable for defects therein resulting from the negligence of the person in making repairs: *Warner v. Erie R. R. Co.*, 39 N. Y. 468; *Wood's Master and Servant*, 903; *Stark v. McLaren*, 10 C. S. 3d series.

Unless the negligence of the deceased was slight and the negligence of appellant gross in comparison, no recovery can be had: *Kewanee v. Dupew*, 80 Ill. 119; *Keokuk Packet Co. v. Henry*, 50 Ill. 264; *C. B. & Q. R. R. Co. v. Dunn*, 52 Ill. 260; *Shearman and Redfield on Neg.* § 320.

The burden of proof is upon the plaintiff to show that the explosion was not caused by the negligence of the deceased, or that his negligence was slight in comparison to that of the defendant: *Ill. Cent. R. R. Co. v. Houck, adm'r*, 72 Ill. 235; *Chicago v. Major*, 18 Ill. 349; *C. & A. R. R. Co. v. Mock, adm'x*, 72 Ill. 141.

And to show that the deceased exercised due care, and caution, and that his negligence did not contribute to the injury complained of: *Dyer v. Talbot*, 16 Ill. 300; *G. & C. U. R. R. Co. v. Fay*, 16 Ill. 558; *Nolan v. Schickler*, 4 Cent. Law J. 263.

That an instruction given for plaintiff which ignored the question of knowledge of the defects in the machinery on the part of the deceased, was erroneous: *Camp. P't. Mfg Co. v. Ballou, adm'r*, 71 Ill. 417.

And such error in instructions is not cured by giving other instructions not objectionable: *C. B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88; *C. & A. R. R. Co. v. Murray*, 62 Ill. 326; *C. B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510; *St. L. & S. E. R.*

Morris v. Gleason.

R. Co. v. Britz, 72 Ill. 256; I. C. R. R. Co. v. Maffit, 67 Ill. 431.

That negligence is a question for the jury under the circumstances of each particular case, and an instruction which tells the jury what constitutes negligence in that particular case, is erroneous: Skelly v. Kahn, 17 Ill. 170; G. & O. U. R. R. Co. v. Yarwood, 17 Ill. 468; Chicago v. Major, 18 Ill. 349.

If the deceased had a better opportunity of knowing the true condition of the machinery than the defendants did, he took all risk of known and unknown dangers, and no recovery can be had for injuries received in the course of such employment: Gibson v. Pacific R. R. Co. 46 Mo. 163; Paulmier v. Erie R'y Co. 34 N. J. 151; Dewitt v. Pacific R. R. Co. 50 Mo. 302; Mad River R. R. Co. v. Barber, 5 Ohio St. 541; Kroy v. C. R. I. & P. R. R. Co. 32 Iowa, 357; Davis v. Detroit, etc. R. R. Co. 20 Mich. 105; Thayer v. St. Louis, etc. R. R. Co. 22 Ind. 26; Frazier v. Pa. R. R. Co. 38 Pa. St. 104; Ind. etc. R. R. Co. v. Lane, 10 Ind. 556; Greenleaf v. Ill. Cent. R. R. Co. 33 Iowa, 52; McMillan v. Saratoga, etc. R. R. Co. 20 Barb. 449; Wright v. N. Y. Cent. R. R. Co. 25 N. Y. 566; McGlynn v. Broderick, 31 Cal. 376; Skipp v. Eastern, etc. R. R. Co. 3 H. & N. 258; Seymour v. Maddox, 16 Q. B. 326; Combs v. New Bedford Co. 102 Mass. 586; Wonder v. B. & O. R. R. Co. 32 Md. 410; Buzzell v. Mfg. Co. 48 Me. 121; Dýner v. Leach, 26 L. J. Exch. 221; Huddleston v. Lowell Machine Shop, 106 Mass. 282; Priestly v. Fowler, 3 M. & W. 1; Wharton on Neg. § 217; Shearman and Redfield on Neg. § 87.

Messrs. WILLIAMS, McKENZIE & CALKINS, for appellee; contended that the verdict will not be set aside unless clearly against the weight of evidence, and cited Allen v. Smith, 3 Scam 97; Weldon v. Francis, 12 Ill. 460; Bloomer v. Denman, 12 Ill. 240; French v. Lowry, 19 Ill. 158; Cross v. Cary, 25 Ill. 562; Aurora F. Ins. Co. v. Eddy, 55 Ill. 213; Walker v. Martin, 59 Ill. 348; McNellis v. Pulsifer, 64 Ill. 494.

Where there is evidence from which the jury could find their verdict, it will not be disturbed, although in the opinion of the appellate court the evidence might justify a different

Morris v. Gleason.

result: T. W. & W. R. R. Co. v. Moore, adm'r, 77 Ill. 217; C. B. & Q. R. R. Co. v. Gregory, 58 Ill. 272.

When a person enters a service which from its nature is hazardous, he does it at the risk of all perils *necessarily and naturally* incident to such employment: Gibson v. Pacific R. R. Co., 46 Mo. 163; Baxter v. Roberts, 44 Cal. 187; Gunderson v. Peterson, 65 Ill. 193.

He does not assume the risk of extra hazards not brought to his notice either directly or indirectly: Baxter v. Roberts, 44 Cal. 187; Gibson v. Pacific R. R. Co., 46 Mo. 163; Hayden v. Mfg. Co., 29 Conn. 548; Ryan v. Fowler, 24 N. Y. 410; Noyes v. Smith, 28 Vt. 59.

An employer is bound to furnish safe and suitable machinery, and keep the same in proper repair: Wonder v. B. & O. R. R. Co. 3 Am. Rep. 144; Wright v. N. Y. Cent'l R. R. Co., 25 N. Y. 563; Ryan v. Fowler, 24 N. Y. 413; Keegan v. Western R. R. Co. 8 N. Y. 180; Ill. Cent. R. R. Co. v. Welch, 52 Ill. 183; C. & N. W. R. R. Co. v. Taylor, 69 Ill. 461; C. & I. C. R'y Co. v. Troesch, 68 Ill. 548; C. & A. R. R. Co. v. Shannon, 43 Ill. 338; C. B. & Q. R. R. Co. v. Gregory, 58 Ill. 272; Perry v. Marsh, 25 Ala. 659; Cayser v. Taylor, 10 Gray. 274; Byron v. N. Y. State Print. Co, 26 Barb. 39; Noyes v. Smith, 28 Vt. 59; Hallower v. Henley, 6 Cal. 209; Sizer v. Syracuse, 7 Lans. 67; Perry v. Ricketts, 55 Ill. 234; T. W. & W. R'y Co. v. Fredericks, 71 Ill. 294; Schr. Norway v. Jensen. 52 Ill. 373.

An employer cannot delegate to another the responsibility of seeing that things are kept in proper shape, and by so doing escape liability: Corcoran v. Holbrook, 59 N. Y. 517; C. & N. W. R. R. Co. v. Swett, 45 Ill. 197; T. W. & W. R'y Co. v. Ingraham, 77 Ill. 309; T. W. & W. R'y Co. v. Moore, 77 Ill. 217; Laning v. N. Y. Cent. R. R. Co. 49 N. Y. 532.

It is not necessary to bring actual knowledge of defects to the notice of the employer; it is his duty to find them out: T. P. & W. R. R. Co. v. Conroy, 61 Ill. 162; same case, 68 Ill. 560.

An employer knowing hidden extra hazards is bound to disclose them to his employee: Baxter v. Roberts, 44 Cal. 187;

Morris v. Gleason.

Clarke v. Holmes, 7 H. & N. 937; Fort Wayne R. R. Co. v. Gildersleeve, 33 Mich. 133; Strahlendorf v. Rosenthal, 30 Wis. 697; Spelman v. Fisher, 56 Barb. 151; Fairbank v. Haentzsche, 73 Ill. 236.

The instructions, if taken together, fairly state the law and have no tendency to mislead the jury, and that is all that can be required: Gilchrist v. Gilchrist, 76 Ill. 281; Hardy v. Keeler, 56 Ill. 152; Graves v. Shoefelt, 60 Ill. 462; Daily v. Daily 64 Ill. 329; Howard F. & M. Ins. Co. v. Cornick, 24 Ill. 455; Ill. Cent. R. R. Co. v. Swearingen, 47 Ill. 206; Springdale Cem'y Ass'n v. Smith, 24 Ill. 480; C. B. & Q. R. R. Co. v. Dickson, 63 Ill. 151; Stobie v. Dills, 62 Ill. 432; Lettick v. Honnold, 63 Ill. 335; C. R. I & P. R. R. Co. v. Herring, 57 Ill. 59; Stowell v. Beagle, 79 Ill. 525; T. W & W. R. R. Co. v. Moore, 77 Ill. 217.

LELAND, P. J. This was an action on the case by the administratrix of the estate of George H. Gleason, against Nelson Morris, Joseph C. Niles, Michael O'Neil, and George McGuire. The suit was dismissed, as to all the defendants served except Morris.

The action was brought to recover damages on account of the death of said George H. Gleason, and there was a verdict and judgment for \$5,000. The defendants against whom the suit was brought, composed a firm operating a steam flouring mill, at Kewanee, in Henry county. The deceased was employed as an engineer to run a steam engine, used in the mill. It is alleged in the declaration that while doing so with due care and diligence, in the full hope and belief that the engine and boiler were perfect and safe, the boiler exploded and killed him; that it was not perfect, but was unsafe, as defendants then and there well knew, and that the death was caused by the neglect and carelessness of defendants in not providing a sufficient, safe and suitable boiler.

There was evidence tending to show that the boiler was unsafe and imperfect to the knowledge of the defendants, and that their negligence may have caused the death as alleged.

The main controversy in the case would seem to have been

Morris v. Gleason.

on the subject whether the deceased exercised proper care and caution, and also as to whether he was aware of the defects in the boiler, to which the explosion should be attributed. Appellee contended that although deceased might have known that the boilers were in a dangerously imperfect condition, and that he had acknowledged this to be so, that he thought so merely because the boilers leaked, and not because the material of which they were constructed was old, rotten and defective. Appellant contended that deceased was fully aware of all the causes of danger, if any, and that he knowingly took the risk of the dangerous employment.

The question whether the instructions were erroneous or not is the only one we propose to discuss. As we have come to the conclusion to reverse, we will say nothing as to the weight of the evidence, except to say that the case is one, on the evidence, in which instructions should be accurate.

There was but one question made as to the admission or exclusion of evidence.

Appellant desired to prove that there was no negligence on the part of the firm because its loss by the explosion was \$20,000.

We agree with the court below in its ruling excluding the evidence. There are, however, in our judgment, some serious defects in the instructions, and we are of the opinion that in a case of this kind, substantially defective instructions of an important character are not cured by others not containing the imperfection. *C. B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88; *Camp Point M'f'g Co. v. Ballou*, 71 Ill. 417; *T. W. & W. R. W. Co. v. Larmon*, 67 Ill. 68; *I. C. R. R. Co. v. Moffitt*, 67 Ill. 431; *Baldwin v. Hillian*, 63 Ill. 550; *C. B. & Q. R. R. Co. v. Lee*, 60 Ill. 501; *C. B. & Q. R. R. Co. v. Payne*, 49 Ill. 499.

The first instruction asked on the part of appellee and given, is as follows:

“The court instructs the jury that if they shall believe from the evidence, that the defendant, Nelson Morris, was the owner or part owner of a steam flouring mill, a part of the machinery of which was a steam boiler and engine, and that George H. Gleason was in the employ of said defendant as engineer, and that while in such employment as engineer, the said George

Morris v. Gleason.

H. Gleason was killed by the explosion or blowing off of said boiler, and left next of kin, and that the plaintiff is the administratrix of said George H. Gleason; and if the jury further believe from the evidence that the explosion or blowing off of said boiler was caused by defects of material or construction of said boiler which was known to defendant, or any of his partners, if he had any, and that said George H. Gleason was then and there in the exercise of ordinary care and prudence, and that the said explosion or blowing off was not caused wholly or in part by the fault of said George H. Gleason, then the jury should find for the plaintiff."

The first objection to this instruction is that it entirely omits to mention the very important fact that deceased was not aware of the defects in the boiler which caused the explosion. The statement that deceased exercised ordinary care and prudence, and that the explosion was not caused by his fault applies to another branch of the case; that is, that deceased used due care and diligence, and that his negligence did not materially contribute to cause the explosion.

Now, although the explosion was not caused by the fault of the deceased, yet if he was aware that the boiler was defective in those particulars which caused it to explode, there could be no recovery, even though the deceased may have exercised the greatest care to prevent those causes from producing the effect, or to have kept out of the reach of the injurious effect of the explosion. It is said that he could not have exercised care, and that the explosion could not have been without his fault, if he was aware of the defects which caused the explosion. We do not understand this to be so at all. He may have well known all the defects; may have concluded to be as careful as he could, and take the risk rather than seek employment elsewhere. He said that he expected most any day to get his head blowed off by the boiler, that the fireman had left on account of the danger, but if his employers would give him the fireman's wages in addition to his own, he would fire and run the whole thing. With this and other evidence tending to show that he was well aware that the boilers were defective, not merely because they leaked, but for the other reasons stated in the evidence, the

Morris v. Gleason.

omission mentioned rendered this instruction fatally defective.

It is not necessary to cite authority to show that there could be no recovery if the deceased knew of the defects which caused the explosion, and knowingly took the risk. The instruction should have contained the statement, or some equivalent one, after the word Gleason in the last line or elsewhere, "and if deceased was not aware, or by the exercise of reasonable inquiry could not have ascertained the defect which caused the explosion," then the jury should find for the plaintiff.

We consider, also, that the defects known to the defendant or his partners, though they actually did produce the explosion, should have been of a character which they, or either of them, could, by exercising skill, have ascertained to be likely to produce the explosion. There might have been defects, and these might have produced the explosion, and these defects might have been known, and yet they may have been such as no amount of care and caution on the part of the firm would have disclosed to be dangerous, and to be guarded against as dangerous.

There should have been after the words "partners, if he had any," or elsewhere, some such expression as "likely to cause an explosion," "rendering the boiler unsafe," or something to that effect.

It is not necessary to cite authority to show that the employer is not an insurer of the employee against accidents from defective machinery. The rule is diligence, perhaps high or the highest diligence, still there can be no liability without some neglect to do that which ought to be done to have the machinery safe. This instruction makes liability without any neglect. *C. C. & I. C. R. W. Co. v. Troesch*, 68 Ill. 545.

The third instruction as applicable to the evidence is wrong, though the defect might not be discernible upon the face of the instruction without making such application to the evidence tending to show that the deceased was himself given the superintendence of the repairs of the boiler, with power to call upon Keeler to make such repairs, as he, deceased, should direct to be made. If Keeler had been employed directly to make the repairs, and not to make them under the superintendence of the deceased,

Morris v. Gleason.

the instruction would have been well enough, except that there seems to be an assumption in it that the boiler was unsafe, and that the firm was responsible because of such unsafety.

The objection urged, however, is that the jury may have considered the instruction a direction, that although the charge and control of the repairs may have been given to the deceased himself, and Keeler requested by Niles to make repairs under the charge and direction of the deceased, that defendant could not thereby have been saved from responsibility.

We consider it quite clear that he might, from all injury which resulted from the want of care on the part of the deceased in properly discharging the duty of directing what repairs ought to be made. It may be true that Niles may have requested Keeler to make repairs when needed, and it may also be true that deceased was to determine when such repairs were needed to be made by Keeler. The language "that an employer cannot delegate to another person, power as an agent and thereby save himself from responsibility" is too broad, because it would include the deceased himself.

The fourth instruction of appellee is objected to mainly because it authorizes the jury to believe otherwise than from the evidence in the case. We have examined it carefully, and have concluded that it is substantially good and not defective for the reason alleged.

The fifth may be somewhat objectionable because it contains an assumption that defendant was responsible for damages resulting from defects not known to deceased. Perhaps to make it entirely unobjectionable the words "if any" should have been added after the word "responsibility," near the end of it. The object and intent of the instruction was, however, so plainly to define the rights and duties of the deceased, that no harm could have been done by the supposed assumption of neglect on the defendant's part.

The objection of appellant to appellee's sixth instruction has some force in it. Though Gleason may not actually have known of the defects in the boiler which caused the explosion, still the jury might say that a person with no more means of ascertaining the facts than those mentioned in the instruction,

C. B. & Q. R. R. Co. v. Sykes.

ought by the exercise of reasonable diligence certainly to have discovered them. There ought to have been added "or which with his means of knowledge would not have been ascertained by the exercise of reasonable diligence," or something to that effect. The objection to the sixth does not apply to the seventh, which contains the substance of that omitted in the former in the following expression, "which he was not bound by reasonable prudence and care in his employment, under the circumstances to have known."

If the seventh be correct, it does not cure the defect in the sixth, in our judgment. The objections to the eighth, though strongly pressed, are met by the answer that it is a copy of one approved by the Supreme Court in the case of the C. B. & Q. R. R. Co. v. Payne, 59 Ill. 534, as the fifth given on the part of the appellee. The meaning of the instruction is, that if it be a case for damages, then the damages should be such, etc., and the expression would be a better one to say: If the jury believe from the evidence that the plaintiff is entitled to recover, then she should recover such damages, etc. This is really the idea intended, though not accurately expressed. For the errors mentioned in the instructions, we have concluded that there must be a reversal; and the judgment is reversed and the cause remanded.

Reversed and remanded.

1	520
51	631

THE CHICAGO, BURLINGTON & QUINCY R. R. Co.

V.

CHLOE M. SYKES, Adm'x.

1	520
110	1547

1. RAILROADS—PASSING UNDER TRAIN—NEGLIGENCE.—Under ordinary circumstances, and without any encouragement from the servants of the company that it might be safely done, a person attempting to pass a train of cars to which an engine was attached and liable to be set in motion at any moment, by crawling under the cars, would be guilty of such gross negligence as would prevent a recovery.

2. INSTRUCTION—INVITATION BY THE CONDUCTOR TO PASS UNDER.—An instruction to the effect that if the train was negligently left across the street,

C. B. & Q. R. R. Co. v. Sykes.

and it was impossible to pass without going over or under the train; that the conductor called out to the deceased to "come on under, you will have plenty of time;" and that deceased, relying upon such invitation, attempted to go under, using such care as an ordinarily careful man would use under the circumstances, etc., the defendant would be liable, is erroneous, it being liable to be understood by the jury as meaning that if the deceased exercised reasonable care while passing under the car, it would excuse him, though it might have been grossly negligent for him to have accepted the invitation. All the facts stated in such instruction might have been true, and still the deceased have been guilty of great negligence.

3. INSTRUCTIONS ON THE PART OF THE APPELLANT.—An instruction asked by appellant to the effect that if the jury believe that a man using ordinary care and prudence would not crawl under a freight train, to which he knew or had means of knowing, a locomotive was attached, liable to start at any moment, even if invited so to do by the conductor of the train, etc., they should find for the defendant, should have been given. It contains an accurate statement of the law. If it was not ordinary care and prudence, though invited, to crawl under a car, under such circumstances, no recovery should be had. The conductor and the deceased might both be grossly negligent, the former for giving and the latter for accepting the invitation, and if both were grossly negligent or equally in fault, no recovery could be had.

4. INVITATION BY CONDUCTOR.—Under the circumstances of this case, the invitation by the conductor to the deceased to come under the train, should be taken into account along with the other circumstances of the case, in determining whether the deceased exercised due care and caution in attempting to pass the train in this manner.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. WILLIAM C. NORCROSS, for appellant; that the deceased was guilty of gross negligence in crawling under the train, in any view of the case cited, C. B. & Q. R. R. Co. v. Lee, adm'x, 68 Ill. 576; C. B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510; C. B. & Q. R. R. Co. v. Dewey, 26 Ill. 255; C. B. & Q. R. R. Co. v. Dunn, 52 Ill. 260; Ill. Cent. R. R. Co. v. Baches, 55 Ill. 379.

That the court erred in refusing defendant's 13th and 15th instructions: C. B. & Q. R. R. Co. v. Lee, 68 Ill. 576; Keokuk Packet Co. v. Henry, 50 Ill. 264; T. P. & W. R. R. Co. v. Riley, 47 Ill. 514; C. B. & Q. R. R. Co. v. Dewey, 26 Ill. 255; Ohio & Miss. Ry. Co. v. Stratton, 78 Ill. 88; C. B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510; C. B. & Q. R. R. Co. v.

C. B. & Q. R. R. Co. v. Sykes.

Dunn, 52 Ill. 260; C. & A. R. R. Co. v. Gretzner, 46 Ill. 82.

That the verdict should have been set aside as being clearly against the weight of evidence: Adams Ex. Co. v. Jones, 53 Ill. 463; Clement v. Bushway, 25 Ill. 200; Boren v. Bartleson, 39 Ill. 43; Gibson v. Webster, 44 Ill. 483; Scott v. Plumb, 2 Gilm. 595; Lowrie v. Orr, 1 Gilm. 70; Keaggy v. Hite, 12 Ill. 99; Baker v. Pritchett, 16 Ill. 66; Miller v. Hammers, 51 Ill. 175; Chase v. Debolt, 2 Gilm. 371; Higgins v. Lee, 16 Ill. 495; Gordon v. Crooks, 11 Ill. 142; Kewanee v. Depew, 80 Ill. 119; Ill. Cent. R. R. Co. v. Chambers, 71 Ill. 519; C. R. I. & P. R. R. Co. v. Bell, 70 Ill. 102.

That an invitation to the deceased by the conductor of the train to crawl under the car was not within the duties of such conductor, and defendant cannot be held liable therefor: Story on Agency, 156; 1 Greenl's Ev. 129; 1 Wharton on Ev. 252; Davison v. Porter, 57 Ill. 300; Snyder v. Hannibal & St. Jo. R. R. Co. 60 Mo. 413; St. L. & Memphis Packet Co. v. Parker, 59 Ill. 23.

That an instruction to that effect was erroneous, as being calculated to mislead the jury: Paulin v. Howser, 63 Ill. 312; Brown v. Graham, 24 Ill. 628.

That evidence of statements made by the conductor not within the scope of his agency, and made after the transaction, was improperly admitted: Story on Agency, 156; 1 Greenl's Ev. 129; 1 Wharton on Ev. 252; Law v. Bryant, 9 Gray 245; Robinson v. R. R. Co. 7 Gray, 92; Anderson v. Rome, etc. R. R. Co. 54 N. Y. 834; Griffin v. Montgomery R. R. Co. 26 Ga. 111; Luby v. Hud. R. R. R. Co. 17 N. Y. 131; Bank v. Stewart, 37 Me. 519; Great Western R. R. Co. v. Willis, 18 C. B. 748; Allen v. Denston, 8 C. & P. 706; Stiles v. Western R. R. 8 Met. 46; Cooley v. Norton, 4 Cush. 93; Treadway v. Sioux City, etc. R. R. 8 Am. Rep. 415; Ang. and Ames on Cor. 334; Paley on Agency, 207.

That the deceased was violating a statute law of this State in crawling under the train: Rev. Stat. 1874, 810.

That the deceased was clearly guilty of gross negligence as is proven by all the testimony in the case: Kewanee v. Depew, 80 Ill. 119; Ill. Cent. R. R. Co. v. Chambers, 71 Ill. 519; Ill. Cent. R. R. Co. v. Hall, 72 Ill. 222; Snyder v. Hannibal &

C. B. & Q. R. R. Co. v. Sykes.

St. Jo. R. R. Co. 60 Mo. 413; R. R. I. & St. L. R. R. Co. v. Byam, 80 Ill. 528; Sterling Bridge Co. v. Pearl, 80 Ill. 251; I. C. R. R. Co. v. Goddard, 72 Ill. 567; St. Louis & S. E. R. R. Co. v. Britz, 72 Ill. 256; T. W. & W. R. R. Co. v. Barlow, 71 Ill. 640; I. C. R. R. Co. v. Godfrey, 71 Ill. 500.

A higher degree of care is required of an adult than of a child: C. & A. R. R. Co. v. Murray, 71 Ill. 601; C. B. & Q. R. R. Co. v. Dewey, 26 Ill. 255; R. R. Co. v. Gladman, 15 Wall. 408.

Messrs. STEWART & PHELPS, for appellee; insisted that the question whether the deceased was guilty of negligence was a proper one for the jury, and cited I. & St. L. R. R. Co. v. Stables, 62 Ill. 315; T. W. & W. R. R. Co. v. Spencer, 66 Ill. 528; T. W. & W. R. Co. v. Triplett, 38 Ill. 482; C. & N. W. R. R. Co. v. Sweeney, 52 Ill. 325; I. C. R. R. Co. v. Hammer, 72 Ill. 347; P. D. R. R. Co. v. Mullins, 66 Ill. 526.

That where the evidence is conflicting, the verdict will not be set aside, unless grossly against the evidence: Morgan v. Ryerson, 20 Ill. 343; Millikin v. Taylor, 53 Ill. 509; Chicago v. Garrison, 52 Ill. 516; Voltz v. Stephani, 46 Ill. 54; Bagley v. McClure, 46 Ill. 381; Baker v. Robinson, 49 Ill. 299; Chicago v. Smith, 48 Ill. 107; Crain v. Wright, 46 Ill. 107; McCarthy v. Mooney, 49 Ill. 247; Keith v. Fink, 47 Ill. 272; Hope Ins. Co. v. Lonergan, 48 Ill. 49.

That deceased was not guilty of gross negligence in passing under the train upon invitation of the conductor: R. R. I. & St. L. R. R. Co. v. Coultas, 67 Ill. 398; I. C. R. R. Co. v. Slatton, 54 Ill. 133; I. C. R. R. Co. v. Able, 59 Ill. 131.

That it was negligence on the part of the railroad company to obstruct the sidewalk: C. B. & Q. R. R. Co. v. Dewey, 26 Ill. 255; Rev. Stat. 1877 (Hurd's Ed.), 771.

If the negligence of the party injured was slight and that of the company gross, a recovery can be had: T. W. & W. R. R. Co. v. O'Conner, adm'r, 77 Ill. 391; C. & N. W. R. R. Co. v. Sweeney, 52 Ill. 325; C. & N. W. R. R. Co. v. Coss, 73 Ill. 394; I. & St. L. R. R. Co. v. Herndon, 81 Ill.

C. B. & Q. R. R. Co. v. Sykes.

143; G. & C. N. R. R. Co. v. Jacobs, 20 Ill. 478; C. B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510; R. R. I. & St. L. R. R. Co. v. Coultas, 67 Ill. 398; C. & A. R. R. Co. v. Sullivan, 63 Ill. 293; C. & A. R. R. Co. v. Gretzner, 46 Ill. 74; C. & A. R. R. Co. v. Murray, 62 Ill. 326; I. C. R. R. Co. v. Waddlesworth, 43 Ill. 66; St. L. & A. etc. R. R. Co. v. Manly, 58 Ill. 306.

I. C. R. R. Co. v. Maffit, 67 Ill. 431; I. C. R. R. Co. v. Hammer, 72 Ill. 347; R. R. I. & St. L. R. R. Co. v. Hillmer, 72 Ill. 235; C. B. & Q. R. R. Co. v. Triplett, 38 Ill. 482; T. W. & W. R'y Co. v. McGinnis, 71 Ill. 346; I. C. R. R. Co. v. Cragin, adm'r, 71 Ill. 177; Dimick v. C. & N. W. R'y Co. 80 Ill. 341; St. L. V. & T. H. R. R. Co. v. Dunn, 78 Ill. 197; C. & A. R. R. Co. v. Hogarth, 38 Ill. 370.

That it was gross negligence to start the train in the manner it was started without giving a signal by blowing the whistle or ringing the bell: R. R. I. & St. L. R. R. Co. v. Linn, 67 Ill. 109; I. C. R. R. Co. v. Hammer, 72 Ill. 347; T. W. & W. R. R. Co. v. Miller, 76 Ill. 278; C. B. & Q. R. R. Co. v. Stumps, 55 Ill. 367.

Instructions that take from the jury a consideration of the facts in the case, or that are calculated to mislead, should be refused: Frasure v. Zimmerly, 25 Ill. 202; Dart et al. v. Horn, 20 Ill. 212; Duffield v. Delancy, 36 Ill. 258; Winn v. Hammond, 37 Ill. 99; Stout v. McAdams, 2 Scam. 67; Baxter v. The People, 3 Gilm. 368; Hill v. Ward, 2 Gilm. 285; Denman v. Bloomer, 11 Ill. 177; Coughlin v. The People, 18 Ill. 266; Harris et al. v. Miner, 28 Ill. 136; C. B. & Q. R. R. Co. v. George, 19 Ill. 510; Hosley v. Brooks et al. 20 Ill. 116; Calhoun Co. use, etc. v. Buck et al. 27 Ill. 440; Pfund et al. v. Zimmerman, 29 Ill. 269; Trustees, etc. v. McCormick Bros. 41 Ill. 323.

All that appellant was entitled to ask was given by the court, and should not be repeated in other instructions: Hesing v. McCloskey, 37 Ill. 341; McKichan v. McBean, 45 Ill. 228; Underwood v. White, 45 Ill. 437; Freeman v. Tinsley, 50 Ill. 497; Calhoun v. O'Neal, 53 Ill. 354.

Generally as to the liability of the master for the acts of his.

C. B. & Q. R. R. Co. v. Sykes.

servant: Wilton v. Middlesex R. R. 107 Mass. 169; Bayley v. Manchester, etc. R'y Co. 8 C. P. 153; Cosgrove v. Ogden, 49 N. Y. 255; Anderson v. Rome, etc. R. R. Co. 54 N. Y. 340; Luby v. H. R. R. Co. 17 N. Y. 133.

That substantial justice has been done, and the verdict will not be disturbed: Leigh v. Hodges, 3 Scam. 15; Dishon v. Shorr, 19 Ill. 59; Pahlman v. King, 49 Ill. 266; Hall v. Groufe, 52 Ill. 421; Watson v. Woolverton, 41 Ill. 241.

LELAND, P. J. This was an action brought in Warren county by appellee, as administratrix of Francis M. Sykes, deceased, against appellant, to recover damages for the death of the deceased, who was injured in May, 1876, while attempting to pass under one of the cars of a freight train, at Knoxville, in Knox county, in order to take passage upon a passenger train. There was a verdict for plaintiff of \$4,250.

The wheel of the freight car passed over the foot of the deceased, and the death resulted from tetanus or lock-jaw some eight days after the injury. The deceased had been station agent for the company for several years, but at the time of his injury he had ceased to be, and his son, Loren Sykes, had succeeded him. At the time deceased attempted to pass under the freight train, the engine was attached, and the steam was up, and the train in a condition to start at any moment when it was desired to cause it to move, and according to the evidence of some witnesses, liable to be moved by the escape of steam into the cylinder, without any agency of the engineer. The two trains were standing lengthwise, east and west, the passenger train north of the station, on the main track, the freight south of it on a side track. The street running north and south, along which it was necessary to go to pass from the depot to his home, was obstructed by the freight train, which stood across it. The deceased was at the depot, and was going to take the passenger train to go fishing. Desiring to go home to get his boots, he passed under the freight train to go home, came back with his boots, and attempted to again pass under the train, because it was so far to go around that he might miss the passenger train. He attempted to crawl under

C. B. & Q. R. R. Co. v. Sykes.

a freight car at or near the sidewalk, with his boots in his hands, and while making such attempt the freight train started and he was injured.

That under ordinary circumstances, and without any encouragement from the servants of the company that it might be safely done, such conduct of the deceased would be gross negligence, sufficient to prevent a recovery would seem to admit of no doubt. *C. & N. W. R. R. Co. v. Coss*, 73 Ill. 394; *C. B. & Q. R. R. Co. Dewey*, 26 Ill. 255, and the court below so instructed. There was however evidence tending to show that the conductor of the freight train said to the deceased, before he attempted on his return with the boots, to pass under the cars: "Come on under, Mr. Sykes, you will have plenty of time."

This was positively denied by the conductor, who says he did not see Sykes till he was under the cars; and that he then said: "Hurry up, Mr. Sykes," and to the brakeman, "Grab him, boys," and there was other evidence to the effect that there was no invitation or request by any one. One witness says the words were: "Come on," "Hurry out," "Grab him," "Catch him," or the like.

As we have concluded that the judgment must be reversed for errors in the instructions, we do not deem it necessary to determine whether giving the appellee the benefit of all conclusions of fact in her favor, about which the evidence conflicts, it is a case where there can be no recovery, on account of negligence on the part of the deceased, though this position is strongly urged by appellant's counsel. We will not go to the length of saying that there might not be a case where a man of ordinary prudence might be disposed to so act, under such advice of a conductor who might be supposed to be able to control the train. We can, however, readily imagine that a man of ordinary prudence might not be willing to accept an invitation of the kind, and that he might think it a reckless, careless thing for even a conductor of a freight train, which was ready to start, to give such advice under somewhat similar circumstances. There may be a different state of facts on another trial, when it will be for the jury to say whether there was due care on the part of the deceased, or whether he was negligent in accepting

the invitation, or assurance of safety, and acting under it, taking into account the danger of missing the passenger train, the consequences of not making the contemplated journey on that train, the age, activity, and bulk of the deceased, his knowledge, or want of knowledge in relation to the operating and control of locomotives and trains, and all the other surrounding circumstances in evidence.

There were a great many objections by appellant's counsel on the trial to the admission and exclusion of evidence.

We have not deemed it necessary to examine these questions very carefully and thoroughly, as they are of a kind not likely to occur on another trial, and as most of them seem unnecessary and unreasonable.

Exception is taken to the giving of the first instruction on the part of the appellee. This instruction is very long, and contains statements which might properly have been omitted. We do not deem it necessary to set it out at length in this opinion. The substance of it is, that if the train was negligently left across the street, so that it was impossible for the deceased to reach the passenger train in time without going under or over the freight train; that the conductor called to deceased and said, "Come on under, Mr. Sykes, you will have plenty of time;" that deceased, relying upon this direction, attempted to go under, using such care and diligence as an ordinarily careful and prudent man would use under all the circumstances; that while he was passing under, using all possible care, caution and diligence, the train suddenly started without ringing the bell or sounding the whistle, and ran over the foot of deceased, and caused his death, the defendant would be guilty.

The instruction was liable to be understood by the jury, and it seems to us that such is its meaning: that if the deceased exercised reasonable care while passing under the car, it would excuse him, though it might have been grossly negligent for him to have accepted the invitation to go under; that is, that he had the absolute right to go under because of the invitation, but that he should exercise care while on the route under.

All the facts stated in this instruction might be true, and still deceased might be very negligent.

C. B. & Q. R. R. Co. v. Sykes.

We do not consider the objection, that facts are assumed by the court, to be well taken. The expression, "If they believe from the evidence," can well be said to relate to all the statements of fact. Nor that the instruction is bad because it recognizes the ability of the conductor to bind the defendant by words uttered not within his agency. We do not consider it entirely outside of his line of duty as a conductor, to give such a direction to one endeavoring to get past his train to take a passenger train.

Exception was also taken to the refusal to give and to the giving as qualified instead of as asked, of some of the instructions asked for by appellant.

The first seven in numerical order were given as asked except that the word "uninvited" was inserted in the third. The eighth was refused and exception taken. This should have been given, unless refused as a repetition of one given, as might have been supposed to be the case in the haste of the trial. We have looked through those given for appellant carefully, and find no one among them the same in principle as this, though others may be in some respects like it as to some of the ideas. The eighth is as follows:

8. "The jury are instructed that it is the rule of law, that it is the duty of every man, no matter in what he may be engaged, or in whatever circumstances he may be placed, to use ordinary care for his own protection, and if the jury believe from the evidence in this cause that a man using ordinary prudence and care would not crawl under a freight train to which he knew, or had by the use of ordinary care and prudence the means of knowing, a locomotive engine, with steam up and liable to start at any moment was attached, even if told by the conductor in charge of such train to come under the same as he (conductor) was holding train for him, and therefore, even if the jury believe that under such circumstances deceased did crawl under a freight train and receive an injury thereby that resulted in his death, that then it will be the duty of the jury to find a verdict in favor of the defendant."

We do not perceive any objection whatever to this instruction. It contains a clear, concise and accurate statement of

the law as we understand it to be. If it was not ordinary care and prudence for the deceased though invited to crawl under that freight car in such close proximity to the wheels, knowing that a locomotive engine, with steam up and liable to start at any moment was attached, he certainly could not recover.

The conductor and the deceased might both be grossly negligent, the former for extending the invitation and the latter for accepting it, and if both were grossly negligent or equally in fault, surely appellee could not recover on the ground that the deceased had a right to perform that which he well knew to be a dangerous act, simply because invited. Authority is not necessary. The principle of this instruction has been often settled by our Supreme Court. We do not desire to be understood that a person of ordinary prudence might never be induced to go under a standing train, with engine on and steam up, by such a request, but it was a question of fact for the jury whether it was ordinary prudence to do so in this case under the invitation, and that is all this instruction claimed.

There does not seem to us to be any serious objection to the qualification of the ninth on the subject of damages. It might have been better to use the words of the statute, "such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting," etc., instead of the words "any such pecuniary damages (if any) as result from such death to the widow and next of kin." The idea seems to be in substance the same in the latter words as in the former. The insertion of the words "if such is the proof" was proper enough in the tenth. The insertion of the word "uninvited" in the third was well enough. As the instruction stood when asked, it made the act of the deceased in going under the cars gross negligence without the invitation being taken into account as a fact to be considered by the jury in extenuation of the conduct of the deceased.

As heretofore mentioned, we are disposed to consider the invitation as a circumstance to be taken into account, among others, in determining whether deceased exercised care and caution. "Uninvited," we think under the evidence, means by

C. B. & Q. R. R. Co. v. Sykes.

the conductor, and not by some irresponsible person, as intimated in the brief of appellant.

The words "and proper for the consideration" added to the fourteenth did not injure it in our estimation.

The fifteenth, which was refused, was as follows :

15. "The jury are instructed, that even though they should believe from the evidence that the bell was not rung, and that the whistle was not sounded on locomotive engine attached to freight train under which deceased was hurt; and if the jury should further believe from the evidence that said freight train blockaded the sidewalk more than thirty minutes, and should further believe from the evidence, that the conductor, Anderson, in charge of said freight train, did say to the deceased prior to his starting under said freight train, "Come on, Mr. Sykes, you have plenty of time," or words of that import, that even then the jury would not be compelled to find a verdict in favor of the plaintiff in the case, but the jury may find a verdict in favor of the defendant."

This was improperly refused for reasons heretofore stated. All these facts mentioned, may exist, and still the jury would not be compelled to find for the plaintiff. Indeed they may all exist, and a verdict for the defendant still be right and proper. The converse or affirmative of it should not have been given on the other side as sufficient to authorize a verdict for plaintiff.

We are not disposed to consider the refusal of the thirteenth and sixteenth as erroneous. They go to the extent that the crawling under the car was gross negligence on the part of the deceased, though he was invited to do so by the conductor: that is, of making it negligence of deceased to prevent a recovery to pass under a freight car, with engine attached and steam up under any circumstances.

In our opinion the court below should have granted a new trial.

For the reasons aforesaid, the judgment is reversed and the cause remanded.

Reversed and remanded.

City of El Paso et al. v. Causey.

THE CITY OF EL PASO ET AL.

v.

AARON CAUSEY.

1. CITIES—CARE REQUIRED IN CONSTRUCTING SIDEWALKS.—Cities are not insurers against accidents, nor are they required to so construct their sidewalks as to secure immunity from injury when used, but they fulfill their duty to the public in that regard when such walks are reasonably safe for persons exercising ordinary care and caution when using them.

2. LIABILITY BY REASON OF PART OWNERSHIP OF BUILDING.—It appeared that in the construction of the building where appellee was injured, the city, desiring a hall for its use, entered into an arrangement with the owners of the land, whereby the city, with others, was to complete the upper story of the building, keep the same in repair, and was then to be a part owner of such upper story. There was no proof that the city had any interest in the land on which the building stood, or in the lower story, or any control over the building of the basement where the injury happened. *Held*, no liability attached to the city on the ground of ownership.

3. LIABILITY OF CITY FOR PERMITTING STAIRWAYS IN STREETS.—In considering the degree of negligence properly attributable to a city in allowing the construction of stairways as entrances to basements from the street, it is not to be judged of from the fact of one accident, but rather what would have been the course of prudent persons prior to the accident. Would it be considered that the sidewalk was unsafe by reason of such entrance? And, considering the character of the entrance with reference to the use of the street as a public way, would it be considered as likely to cause an injury?

4. BURDEN OF PROOF.—In cases of this character, the burden of proof is upon the plaintiff to show, not only that the defendants were negligent, but that at the time of the injury he was in the exercise of due care for his personal safety.

APPEAL from the Circuit Court of Woodford county; the Hon. JOHN BURNS, Judge, presiding.

Messrs. HOPKINS & MORRISON and Messrs. CHITTY, CASSELL & GIBSON, for appellant; that the material allegations of the declaration are not sustained by the evidence, cited city of Aurora v. Pulfer, 56 Ill. 270; city of Centralia v. Krouse, 64 Ill. 19; Chicago v. McGiven, 78 Ill. 347; Quincy v. Barker, 81 Ill. 300; Lovenguth v. City of Bloomington, 71 Ill. 238; Village of Kewanee v. Depew, 80 Ill. 119; C. B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510.

City of El Paso et al. v. Causey.

Messrs. BANGS, SHAW & EDWARDS, for appellee; in support of the judgment below, cited *City of Galesburg v. Higley*, 61 Ill. 287; *Chicago v. Hislop*, 61 Ill. 86; *Chicago v. Langlass*, 52 Ill. 256; *Chicago v. Langlass*, 66 Ill. 361; *Chicago v. Wright*, 68 Ill. 586; *Joilet v. Verley*, 35 Ill. 58; *City of Sterling v. Thomas*, 60 Ill. 264; *Chicago v. Gallagher*, 44 Ill. 295; *Bacon v. Boston*, 3 Cush. 174.

PILLSBURY, J. In 1872, Shur Tompkins & Co. erected a three-story brick building, with basement, on the southeast corner of block forty-two, in El Paso. The building extends about one hundred feet on each street: Front street on the South and Central street on the east.

The corner room was occupied by Shur Tompkins & Company as a bank; the next west, by Young & Tompkins as a dry goods store, then Tobias & Son, grocers, and the west one, by W. A. Johnson, hardware dealer. Under each of these rooms was a basement, used for business purposes, eight feet deep below the level of the sidewalk. The entrance to the basement under the store of Young & Tompkins was by a flight of steps commencing at the edge of the stone-flagging constituting the sidewalk and running at right angles therewith directly to the door of the basement. The north line of the stone pavement was four inches north of the line of the street and the south wall of the building was four feet from the north line of street.

This space between the sidewalk and building was excavated to the depth of the basement along the entire south front of the building, making an area about three feet eight inches wide. Protecting this area was an iron fence over three feet high, extending from the door of the bank to the east line of the basement stairs, where it was connected with a newel-post, eight inches in diameter, standing six inches from the inner edge of the sidewalk. The entrance to the basement was six feet in width and under the east window of the store. The entrance to the store was by a double door in a recess four feet deep, the sides of which recess were glass. An iron platform raised one step, and four and one half feet long, leads over the area from the pavement to the front door step. On each side of this

platform was the *terra cotta* figure of a lion, about four feet high, and extending from the building to line of railing. From the west side of the store entrance the iron railing extends to the next entrance. The sidewalk was ten feet in width, made of Joliet flag-stone, jointed and hammered.

The front windows of the store were each four feet four inches in width and eleven feet high, and containing three panes of glass each.

The proof is full and complete in this record that the sidewalk area, entrances to basement and the stores, and the railing along the area, were constructed in the very safest manner known to practical architects, and equal to any in the largest cities of this country, and that they were at the time of injury to the appellee, in the best repair.

On the first day of November, 1875, the appellee Causey, was passing along the sidewalk from the east, with the intention of going into the store of Young & Tompkins to see a friend, and, as he says, mistaking the east window of the building for the door, he turned to the right around the newel-post and stepped off the sidewalk into the cellar-way, injuring himself quite seriously.

He brought this suit against Young & Tompkins and the city to recover damages for such injury. He claims, as one ground of recovery against the city, that the city was joint-owner of the building, and, therefore, liable, in that capacity for the excavation and the construction of the area and stairs.

It appears from the record that the city and some Masonic bodies desired to have halls in the upper story of the building for their respective uses, and an arrangement was made by which Shur Tompkins & Company, and P. H. Tompkins, would erect the building to the centre of the joists of the second floor, and the city and Masons were to complete the upper story and build the stairs leading thereto, put on the roof and keep the same in repair, and were then to be the owners of such upper story. There is no proof that the city had any interest in the land or the store-rooms, or any control over the building of the basement or the lower stories, as proprietor or part

City of El Paso et al. v. Causey.

owner. We are all of the opinion that no liability attached to the city on the ground of ownership.

Does the case then show such negligence on the part of appellants as will render them liable for the injury sustained by appellee, under all the evidence in this record? It is a matter of common observation, that in all our cities business blocks are built with basements below the level of the sidewalk, and frequently such basements are most valuable for business purposes, and it is not only convenient, but absolutely necessary, that entrances should be had to the same from the street, in order to be available; and such entrances have ever been permitted by the authorities of all cities; and experience has shown that when properly constructed, so as not to encroach upon the traveled way, it is very rarely the case that one is injured therefrom.

In considering the degree of carelessness properly attributable to a city in allowing these entrances to private property from the street, we are not to judge of it from the fact of one accident, but rather what would have been the course of prudent persons prior to the accident. Would such a person consider that the sidewalk was unsafe to travel by reason of such entrance? Would a prudent man, considering the character of the entrance with reference to the use of the street as a public way for travel, come to the conclusion that such entrance was likely to cause an injury? *Chicago v. Starr*, 42 Ill. 174.

These are questions that should be calmly and without prejudice considered by the jury in determining whether the city is properly chargeable with negligence, and the degree thereof. *Ibid*.

The burden of proof in this case is upon the plaintiff to prove to the court and jury not only, that the defendants below were negligent, but that at the time of the injury he was in the exercise of due care for his personal safety.

The evidence shows that this accident occurred in the early part of the evening when the lights were burning in the store of Young & Tompkins as usual, and appellee testified that the light from the window "struck me in the face and I stepped right down the cellar-way," and "I supposed I was in front of

the store door, and turned to go in and found I had mistaken the window for the door, and stepped into the cellar-way."

It is hard to understand how a reasonably prudent man in possession of all his faculties could, in passing along a stone pavement ten feet wide, with all the lights from the store shining through the doors and windows, mistake a window in full view, and of the size of this, for the entrance to a store door materially different in size, appearance and construction and protected by figures nearly four feet high.

The appellee was well acquainted with the sidewalk entrance to the store and to the basement; besides he knew where he was going, and the way to properly go there, and there is no doubt had he paid the least attention to his footsteps, he would not have stepped down a flight of stairs, when he should have done exactly the contrary in order to reach the raised iron platform leading across the area to the store entrance, especially, when, as the proof clearly shows in this case that at the time of the injury the light was so shining upon the stairs, that the first two steps were plainly to be seen from the sidewalk. The circumstances in proof, instead of showing that the appellee was exercising due care for his personal safety, forces upon the mind a conclusion exactly the reverse.

We are not left, however, upon this point, to the inferences from the circumstance alone, for it is in evidence that appellee told various parties that his injury was the result of his own carelessness. Dr. Adams testified, that on the 18th of February, after the injury, Causey came into his office and gave him a history of his injury and detailed the circumstances: "Said he mistook the window for the door, while his attention was being directed some other way; saw the brilliant light and thought it was the door; stated what attracted his attention, and, from my best recollection, he said it was a train that was passing at the time; might have been something else." William Tucker swears "that the first time I saw Causey after the accident was when he first got about from his injuries; met him on the platform of the I. P. & W. R'y, at El Paso; the train from Peoria was just in; shook hands and asked him how he was getting along; spoke

City of El Paso et al. v. Causey.

of his injury and he said it was of his own carelessness that he got hurt; said he was not paying attention to where he was going, but was looking back."

Hannah King says: "That night heard Causey say that he carelessly walked into the stairway; said he saw the light in the window, and thought it was the door and started for it; he said: 'What will my poor wife and children do? I was so careless as to fall down there; don't know why I did such a foolish thing.'" W. A. Johnson says "that at the time Causey fell in the stairway it was light enough so I could see the lions, the newel-post, the hand-rail, the top-rail, the two top steps and the third not so plainly, and could see Causey's feet on, probably, the fourth step. It was light enough on the pavement and the top step so any person could readily distinguish the entrance. When I brought him out of the stairway, saw no indication that he was not in his right mind. Shortly after we placed him on the lounge, he stated that it was by his own carelessness that he fell. Said 'Oh, how careless I was;' think he used this language twice."

H. C. Hubbard says: "On the night he was hurt, I heard him remark once or twice, 'Oh! how careless a man can be;' heard him make the same remark next day, in Peoria."

Jacob Zaines testified that the night he was injured he heard him say it was by his own carelessness that he fell into the basement.

W. R. Willis says he met Causey next spring in El Paso. In conversation with him, he said: "It was my own carelessness." I said: "You were acquainted with the entrance; I am astonished at it, you knowing the situation so well." He said: "It was sheer carelessness in me."

P. A. Simmons and Robert Robinson also testify to same statements of appellee.

These are the statements of disinterested witnesses, and we have no hesitation in giving them the fullest credit, notwithstanding the partial denial of appellee.

We can believe from this positive evidence, in connection with all the other facts and circumstances in proof, that the carelessness of appellee was so great that his injury is directly

Sturgeon v. Burrall et al.

chargeable to it rather than to the negligence of appellants.

Cities are not insurers against accidents, nor are they required to so construct their sidewalks as to secure immunity from injury when used, but they fulfill their duty to the public in that regard when their walks are reasonably safe for persons exercising ordinary care and caution when using them. *City of Chicago v. McGiven*, 78 Ill. 347.

This sidewalk and basement entrance was constructed in the best possible manner, and equal to any in the largest cities; the walk was ten feet wide, even and smooth, and amply safe for any person who was not reckless regarding his own safety. We are of the opinion that the appellee cannot recover upon the case made in this record. He has only his own negligence to blame for his injury.

The judgment must be reversed and cause remanded.

Judgment reversed.

MANSFIELD M. STURGEON, Adm'r, etc.

V.

ANN C. BURRALL ET AL. EX'RS.

1. PARTIES.—In a proceeding by an administrator against certain parties alleged to have been agents of his intestate, for an accounting of their agency, the heirs of plaintiff's intestate are not necessary parties because of their interest. The administrator is the representative to attend to their interest, by collecting what was due the intestate and making distribution thereof.

2. DEMURRER FOR MULTIFARIOUSNESS.—Mere surplusage does not make a bill in chancery multifarious or otherwise bad on demurrer.

3. BILL IN CHANCERY—SUFFICIENCY OF ALLEGATIONS.—The bill in this case alleged that the husband of one of the defendants acted as the agent of complainant's intestate, in the management of her property, and that in such capacity he had received funds belonging to her for which he ought to account to the complainant as administrator, and that the defendant had fraudulently received from him a portion of such funds; it also contained charges of fraud and undue influence on the part of defendants, in obtaining an assignment of such funds. *Held*, that if the allegations of the bill were true, the complainant was entitled to relief, and a demurrer thereto was improperly sustained.

Sturgeon v. Burrall et al.

APPEAL from the Circuit Court of Rock Island county; the Hon. GEO. W. PLEASANTS, Judge, presiding.

Mr. C. M. HARRIS, for appellant; that a widow prevented by fraud from dissenting to her husband's will within the time required by law, will be placed in equity in the same position as she would have been had she dissented in time, cited *Smest et ux. v. Waterhose et al.* 10 Yerg. 94; *Strawn v. Strawn*, 50 Ill. 256; *Paul's Executor v. Paul*, 36 Pa. St. 283; 11 Ala. 32.

Dower may be assigned by parol. Nothing is required but to ascertain the widow's share, and when this is done, and she has entered, the freehold vests in her without livery of seizin or writing: *Boyers v. Newbanks et ux.* 2 Ind. 388; *Lull v. Stubbs*, 35 Me. 95; *Carter v. Hobert*, 41 Me. 230; 51 Me. 369.

Dower survives although not assigned during the lifetime of the widow: *Turner et al. v. Harris et ux.* 27 Miss. 737; *Todd v. Baylor*, 4 Leigh, 507; *Paul's Executor v. Paul*, 36 Pa. St. 282; *Foublanque's Eq.* 23; *Mulford v. Heirs*, 2 Beav. 13.

That the demurrer should not have been sustained, there appearing to be equity in the bill, though not clearly stated: 1 Johns. Ch. 58; 3 Johns. Ch. 467; 5 Johns. Ch. 184; How. Pr. 53; 46 N. Y. 626; *Kenchbon v. McCullough*, 4 Law & Eq. 13; *Wescott v. Wicks et al.* 72 Ill. 524; *Farwell v. Johnston*, 34 Mich. 342; *Place v. Minster et al.* 65 N. Y. 89.

As to fraud: *Story on Sales*, § 158; *Story's Eq. Jur.* § 331; 1 Williams on Ex. 47; *Gale v. Gale*, 19 Barb. 269; *Kennedy's Heirs, etc. v. Kennedy's Heirs*, 2 Ala. 572; *McConnihie v. Savage*, 12 N. H. 376.

As to undue influence: *McLaughlin v. McDent*, 63 N. Y. 213; *Rollwaggon v. Rollwaggon*, 63 N. Y. 504; 41 Ga. 271; *Tyler v. Wilburn, et al.* 20 Mo. 306; *Hall v. Hall*, 18 L. T. Rep. 153; *Davis v. Calvert*, 5 G. & J. 269; *Gardner v. Gardner*, 34 N. Y. 155; *Tyler v. Gardner*, 35 N. Y. 559; *Turner v. Chapman* 2 McCoster, 243; *Moore v. Blannett*, 2 McCoster, 367; *Hall v. Hall*, 38 Ala. 131; *Rockafellow v. Newcomb*, 57 Ill. 187; *Corsett v. Bell*, 1 Younge & C. 578, note; 2 Red. Sur. Rep. 179.

As to presumption of fraud and undue influence from imbecility: *James v. Greaves*, 2 P. Wms, 270.

Sturgeon v. Burrall et al.

Generally as to fraud and undue influence: Willard's Eq. 179; Harding v. Handy, 11 Wheat. 125; Lee v. Dill, 11 Abb. 214; Simpler v. Lord, 28 Ga. 52; 66 Pa. St. 281; Buffalow v. Buffalow, 2 Dev. & B. 141; Long v. Long, 9 Md. 48; Cruise v. Christoph's Adm'r, 5 Dana. 181; 2 Harris, 147; 9 B. Mon. 30; 2 Hogg Eccl. 84; Kerr on Fraud and Mistake, 386; 2 Red. Sur. Rep. 179; Casborne v. Bersham, 2 Beav. 76; Hinchman v. Adm'r of Edmonds, 1 Saxton, 101; Jennings v. McConnell, et al. 17 Ill. 184; Trotter v. Smith, 59 Ill. 244; 8 Harris, 329; Parfit v. Lawless, 2 P. & D. 462; Dean v. Nagley, 41 Pa. St. 312; Monroe v. Barclay, 17 Ohio St. 302; Wilkinson v. Joughlin, L. T. Rep. 2 Eq. 319; Carron v. Hunter, L. T. Rep. 362; Fulton v. Andrew, L. T. Rep. 448.

As to the confidential relations between the parties as affecting their acts: Whelan v. Whelan, 3 Cow. 537; Carpenter v. Danforth, 19 Abb. 225; 2 Red. Sur. Rep. 34; Dent v. Burnett, 7 Sim. 539.

Presumption against the validity of a conveyance or gift to a person occupying the position of trustee or agent: Gould v. Gould, 36 Barb. 270; Story's Eq. Pl. 110; Murphy v. Osborn, 2 J. & L. 222; Farwell v. Farwell, 1 Bush, 511; Moore v. Prancy, 9 Hare, 299; Trotter v. Smith, 59 Ill. 240; Gressley v. Mosely, 3 D. G. F. & J. 433; Todd v. Grove, et al. 33 Md. 188; Yostin v. Laughan, 49 Ill. 594; Griffiths v. Robins, 3 Mad. Ch. 105; Rhodes v. Bate, L. T. Rep. 252; Tonsa v. Judges, 3 Drew, 306; Walker v. Smith, 29 Beav. 394; Nesbit v. Lackman, 34 N. Y. 167; Story's Eq. Jur. 311; Simpler v. Lord, 25 Ga. 52.

Gifts from parent to child: Carpenter v. Herritt, Red. 338; Jukins v. Pye, 12 Pet. 241; Taylor v. Taylor, 8 How. 183; Heman v. Heman, 2 Atk. 160; Berdow v. Dawson, 34 Beav. 603; Stiles v. Stiles, et al, 14 Mich. 72; Wilson v. Bull, 10 Ohio 250; 7 Fla. 7; Kerr on Fraud and Mistake, 179; Paschall, adm'r, v. Hull et al. 5 Jones' Eq. 108.

Upon the question of misjoinder of parties, and that there was a conspiracy between the defendants: Walsham v. Stinton, 1 De. G. J. & S. 678; People v. Tweed, 12 N. Y. S. C. 354; Newman v Fowler, 14 Am. Law Reg. 127; Colt v. Woolaston, 2 P. Wms. 156; Oard v. Oard, 59 Ill. 46; Evans v. Bicknell,

Sturgeon v. Burrall et al.

6 Ves. Jr. 174; Kerr v. Fraud and Mistake, 47; Wheeler v. Reynold, 2 Law & Eq. Rep. 12; Hawley v. Cramer, 4 Con. 718.

Against the objection that the bill is multifarious: McNab v. Heald et al. 41 Ill. 331; Ryan v. Shawneetown, 14 Ill. 20; 18 How. U. S. 253; Buching v. Lloyd, 3 Drew, 227; Winson et al. v. Pettis et al. Sup. Ct. Rhode Island, 1877; 1 Oregon, 254; 19 Ill. 105; 2 Day, 553; Att'y. Gen'l. v. Cradock, 3 Myl. & C. 85; Bedsall v. Monroe, 5 Ired. 313; Salvidge et al. v. Hyde et al. 5 Mad. 89.

As to false representations made to the deceased: Perry on Trusts, 171; Benjamin on Sales, 397; 1 A. K. Marshall, 370; Elder v. Atkins, 45 Ga. 13; Peter v. Wright, 7 Blackf. 178; Harrel v. Harrel, 1 Duval, 203; Bates v. Bates, et al. 27 Iowa 111.

Mr. HENRY CURTIS, Jr. and Mr. CHARLES DUNHAM, for appellees; that the right to the widow's award does not survive to her administrator, cited Adams v. Adams, 18 Met. 170; Foster v. Fifield, 20 Pick. 70; Thompson v. Thompson, 30 Miss. 152; York's Adm'r. v. York, 38 Ill. 522; Cross v. Cary, 25 Ill. 562; 1 Redfield on Wills, 517; North's Probate, § 533 a.

That unless the widow renounced the provisions of the will she could not take her share in the personal estate of her husband: In re Taylor's will, 55 Ill. 252; Boyles et al. v. McMurphy, 55 Ill. 236; White et al. v. Dance, 53 Ill. 413; Rawson v. Rawson, 52 Ill. 62; Skinner et al. v. Newberry, 51 Ill. 203; McMurphy v. Boyles, et al. 49 Ill. 110; Lessly v. Lessly, 44 Ill. 527; Padfield v. Padfield, 78 Ill. 16.

Upon the rule of construction of wills: Boyles et al. v. McMurphy, 55 Ill. 236; White et al. v. Dance, 53 Ill. 413; Rawson v. Rawson, 52 Ill. 62; Ferguson et ux. v. Stewart's Ex'r, Ohio, 140; Boskin's Appeal, 3 Penn. 304; 1 Redfield on Wills, § 430; Williams on Executors, 808; 2 Jarman on Wills, 2.

That the bill cannot be maintained against Edward Burrall for the proceeds of the bonds given to his wife, the tort being waived by bringing the action in this form, and he not having received any of the proceeds of the bonds: Belden v. Perkins, 78 Ill. 449; T. W. & W. R'y Co. v. Chew, 67 Ill. 378; Johnson et al. v. Salisbury, 61 Ill. 316; Creel v. Kirkham, 47 Ill.

Sturgeon v. Burrall et al.

344; *Manahan v. Gibbons*, 19 Johns. 425; *Osborn v. Bell*, 5 Denio, 370; *Crovath v. Plympton's Adm'r*, 13 Mass. 453; 2 Greenl'f. Ev. §108; 10 Pick. 161; 3 Gray, 260; 1 Hill, 234.

No damages for the wrong can be had in this action, but merely an accounting for the amount realized: *Manahan v. Gibbons*, 19 John. 425; *Osborn v. Bell*, 5 Denio, 370; *Crovath v. Plympton's Adm'r*, 13 Mass. 453; *Southerland v. Brush*, 7 John. Ch. 17; *Monell v. Monell*, 5 John. Ch. 283; *Shepardson v. Rowland et al.* 28 Wis. 108; *Shepard v. Sanford*, 3 Barb. Ch. 127.

That damages for failure to assign dower do not survive to the administrator of the dowress: 2 *Scribner on Dower*, 678; *Turney v. Smith*, 14 Ill. 242; *Millar's Adm'r v. Woodman*, 14 Ohio, 518; *Kiddall v. Trimble*, 1 Mad. Ch. 143; *Norton v. Tucker*, 1 Atk. 525; *Rowe v. Johnson*, 19 Me. 146.

In equity, the tenant is considered as trustee of the widow, and answerable to her for his receipts of rent in respect to her one-third: *Johnson v. Thomas*, 2 Paige, 384; *Sellman v. Bowen*, 8 Gill. & J. 50; *Hazen v. Thurber*, 4 Johns. Ch. 604; *Green v. Tenant*, 2 Harr. 336; *Russell v. Austin*, 1 Paige, 192; *Newbold v. Ridgway*, 1 Harr. 55.

That if the tenant dies pending the ascertainment of the widow's dower, the court will assign, provided that at the time of filing the bill, the legal right to damages is not gone: 1 *Story Eq. Jur.* § 625; *Curtis v. Curtis*, 2 Bro. C. C. 620; 2 *Daniels Ch. Pr.* 1140.

That the bill is multifarious, as uniting separate and distinct causes of action, and causes in which one or the other of the defendants has no interest: 1 *Daniel's Ch.* 341; *Burnett v. Lester*, 56 Ill. 311; *Rignold v. Augland*, 11 Sim. 24; *Clanmorgan v. Guisso*, 1 Mo. 131; *Darom v. Fanning*, 4 Johns. Ch. 199; *Harrison v. Hogg*, 2 Ves. Jr. 323; *Boyd et al. v. Hoyt*, 5 Paige Ch. 65; 1 *Barbour's Ch.* 40; *Story's Eq. Pl.* § 271.

LELAND, P. J. The court below sustained separate demurrers filed by the appellees to a bill in chancery and the complainant abiding, it was dismissed. This decision of the court below is assigned for error.

Sturgeon v. Burrall et al.

Appellee complains that the bill is very voluminous; that it is indefinite, uncertain, unintelligible, redundant in statement, multifarious and without equity. With its exhibits it covers some fifty manuscript pages. As it would be remarkable if there could be a bill in equity of such length, with no equity in it, we have endeavored to extract from the bill the material portions.

It alleges that Charles Jack made a will in 1860, and died in 1867; a copy of the will is set out. The will disposes of all his estate, making his daughter Ann C. Burrall residuary legatee and devisee, and her husband, Edward Burrall, Jr., executor. The only portions of the will devising or bequeathing anything to his widow, Ann Jack, are as follows: "Whereas, I consider that my wife Ann will be amply provided for by right of dower in property belonging to me, and in a lot of land near Chicago, heretofore sold by me without relinquishment of dower thereof, merely "in memoriam," I give and bequeath all lots belonging to me in the Town of Knoxville, Knox Co., Illinois, 80 acres of land on Spoon River, said county, the description not now recollected; also town lots in Rome, in Peoria county, to have and to hold the same unto the said Ann Jack, her heirs and assigns in fee simple." "Of my horses I give old Fanny to my wife."

It does not appear by the bill that the widow ever renounced the benefit of the provisions of the will. It is alleged that the deceased left a widow Ann Jack, one daughter Ann C. Burrall, one grand-daughter Mary J. Elliott, married to Frederick P. Burgett, and one grand-son Charles W. Harris, and no other descendants; that he left a large estate, real and personal, in this State and Texas. It is alleged in the bill that Edward Burrall, Jr., at the instance of his wife, converted to his own use the personal estate of Charles Jack, collected rents and other debts and kept the money, some before and some after the death of Charles Jack; and that Ann Jack became entitled, on the death of her husband, to her award of personal property of his estate to amount of \$1,500; to her dower in some land near Chicago, and in the real estate in Henry county. It is also claimed by the bill that she was entitled as a widow, absolutely

Sturgeon v. Burrall et al.

to one-third of all the personal estate left by Charles Jack, deducting the indebtedness, which was claimed to be little if anything; that Ann Jack, the widow, had in her lifetime, and at her decease, moneys, bonds, property, etc., worth more than \$25,000; that the defendants converted and sold such property and the award above mentioned, except such as they delivered to complainant, as afterwards stated. There then follows a long minute account of the physical and mental peculiarities of the widow Jack, giving her weight at 100 pounds, or two-thirds of that at times, state of health, and a long list of her idiosyncrasies, followed by, and apparently stated as evidence to support this allegation at the end, that she never had the capacity to comprehend her rights, interest, property or business affairs, or have much, if any conception thereof, or to transact business with regard thereunto understandingly, nor to select a suitable person to transact it for her, nor to protect her interest against any who might have control of it, or her property, nor for the determination of her rights of property, and that her physical strength and mental capacity were much reduced by great age, and her apprehensions and distress, hereinafter stated, years before the death of her husband, and thereafter much more, and continuously until her death, and long before the transaction of any of the business hereinafter stated, was wholly incapable thereof, or of properly or understandingly transacting any such or other business of any importance whatever.

Next follows a long account of Jack's going to Texas, of his being brought back insane, of how he lived in Texas, among marauding Mexican Indians and half-breeds, who murdered and robbed the inhabitants, that the widow regarded Texans as outlaws and dangerous, and that she suffered from apprehensions for his life, which was aggravated by his being insane, and having been killed by one who was in an asylum with him. Then we have an account of proceedings declaring him insane; that Burrall sought to be appointed conservator and failed; that he tried to represent the estate as worthless, less than a seventh of what it was really worth.

It is also stated that Ann C. Burrall tried to get appointed

Sturgeon v. Burrall et al.

administratrix of Ann Jack, and that she represented the estate to be small. It is also stated that Burrall obtained the agency of Jack's business while one Nowers was acting as such, by means of false and fraudulent representations to Nowers as to Jack's wishes, etc., and that Nowers delivered up money and promissory notes (stating their amount) which were collected by Edward Burrall under the pretense that he was such agent; that Ann Jack resided with Burrall and his wife for some time next before her death; that soon after the death of Charles Jack said Burrall took charge and control of all the interest and property acquired by Ann Jack, as widow of her husband, and of all of her own property, and retained it till her death, though a bank account was kept in her name, as Edward Burrall directed it should be; that said E. Burrall, Jr., sold the dower of said Ann Jack in some land in Cook county for \$20,000, and as her agent he invested \$19,000 thereof in United States registered bonds for the nominal amount and value of \$18,000; that said Edward Burrall, Jr., as such agent, sold the remainder of the dower of the said Ann Jack in the Cook county land for \$1,550, less fees and expenses of sale. Next follows a long account of the improper means and appliances used by Burrall and his wife, alleged to be undue influence, by which Ann Jack was induced to agree that she would accept \$5,000 and her homestead, which was hers, instead of having her dower set off in the remaining lands of the deceased. It is alleged that this was never really paid to her, although probably entered on her bank account at the instance of the said E. Burrall, Jr., without her knowledge, for the purpose of creating, as he supposed, evidence of a payment to her never made nor intended to be.

It is then claimed that her dower was worth more than the \$5,000 and the homestead, and that this agreement should not be recognized as valid, and that she should have what the damages for not setting off the dower or the rent was worth. It is alleged that while the homestead was hers, independent of said dower, of which she was ignorant, she received it as part payment therefor.

It is then alleged that Burrall and wife received a considerable

amount for rents of her homestead, which accrued to said Ann Jack after the death of her husband, and that they have converted them to their own use. Here follows another long account of the false statements and improper conduct of Burrall and wife toward, and their improper influence over, Ann Jack, the widow, culminating in the charge that Burrall and his wife claim that said Ann Jack transferred and delivered to Ann C. Burrall the bonds aforesaid, with this allegation in relation thereto, viz: That at the time of the making of the alleged transfer and delivery aforesaid, and for some time before then, said Burrall and wife exercised over said Ann Jack an habitual power and influence, constraining her to do whatever they desired her to do, however much against her will, desire and interest, and that she had habitually submitted to such power and influence, and did whatever they directed her to do, although against her will and interest, and not because of attachment or affection for either of them, but from fear of them in such matters, which subdued and controlled her more than would have done a fear of force, great bodily injury or of unlawful constraint; that Burrall and wife by reason of said Ann Jack being incapacitated, of her credulity in believing the false representations aforesaid, and on account of her very old age, and by the use of the means aforesaid, and of said Burrall having been her agent for the transaction of all of her business, and of her living with him, and of her having had no independent advice, and of the exercise of undue influence by them over her at the time, and of such fear, did procure from her the alleged assignment of said bonds, and the delivery thereof; that said Ann Jack did make such transfer and delivery at the dictation and by the direction of said Burrall and wife and against her will, and that she would not but for having been compelled to by them; that such transfer and delivery of said bonds is void for the reasons aforesaid and did not divest said Ann Jack of the title thereto.

Next follows a statement of a demand by the complainant upon Burrall and wife, and a delivery of some cash, and notes amounting to about \$2125.00, and of a refusal to account for more, with a prayer for an account of the estate, effects, bonds,

Sturgeon v. Burrall et al.

etc., possessed or come to the hands of the defendants or of any other persons for them, or either of them. There is also a prayer that the \$5,000 should be accounted for under the arrangement to take that for the dower, if the damages for not setting off the dower, or rents cannot be recovered in lieu of the \$5,000.

This contains as much of this lengthy bill as is necessary to an understanding of the questions, and perhaps more.

Among other causes of demurrer, it is said that the two grandchildren were necessary parties, either as complainants or defendants, because of their interest. We have looked at the cases cited by the appellee's counsel, and we do not think them applicable. The amount to be collected, if the remedy was at law, as contended, could only be at suit in the name of the administrator of Ann Jack. It does not appear whether there are creditors having claims against the estate or not. The administrator we consider as the proper person, at law, or in equity, to collect money due the intestate at the time of her death, though the person of whom it should be collected might be entitled to a share on the distribution after payment of debts. Though the grandchildren may have an interest, the administrator is the representative to attend to their interest by collecting what was due the intestate, and making distribution thereof. If there be any equity in the bill, though the amount claimed may be too large, and if the bill is not multifarious the demurrer should not have been sustained, but the court should find for complainant on the hearing for the portion sustained by the evidence.

We might concede that, as the widow did not renounce the provisions of the will, the personal estate of her husband went to the residuary legatee, and that Ann Jack was not entitled to any such personal estate, except the widow's award mentioned in Sec. 74 of Chap. 3, as contended for.

We might also concede that she was not entitled to the award itself, because she did not have it set off to her before she died. and so as to the damages or rents on account of not setting off dower. This would only affect the quantum of the relief upon the final hearing. Mere surplusage does not make a bill multifarious or otherwise bad on demurrer.

Sturgeon v. Burrall et al.

The ground upon which this bill is to be maintained is that Edward Burrall, Jr., alone, or he and his wife together, or Ann C. Burrall alone, were agents in charge of the funds of Ann Jack, under such circumstances as would entitle the principal, or her representatives, to an account of the business of the trust or agency; and as incident to this question is the one whether, if they were so, or if either one was, they have adjusted and settled such matters of agency by appropriating to themselves the trust fund by the consent of the principal, or, in other words, whether she has made them, or one of them, a gift or present of it, or part of it. If capable of making such a gift, and if she fairly did so give her agents the whole fund, under circumstances to be approved by a court of equity, that might end the matter. If not, the agents should account for that so claimed to be given. At any rate, they, or one of them, should account for the portion which was not given.

There is a lack of precision in the allegations of the bill, perhaps unavoidable, as to whether the husband or the wife, or both of them, were the agents or trustees in charge of the business affairs of Ann Jack. After looking at the bill carefully, it would seem that, as between husband and wife, the former was the principal and the wife the aider and assistant. It is alleged that Edward Burrall, Jr., was the business agent or manager of the affairs of Ann Jack. The nature of the business transacted was more proper for a man to perform than for a woman, and the allegations of the bill are that it was transacted by the husband; that an account was kept in the name of Ann Jack at such bank or banks as Edward Burrall, Jr., directed it should be. It is also distinctly alleged that the husband had charge and control; that he, as agent, sold the dower right to some of the Cook county land, and received the \$20,000 therefor, and that he invested it in United States bonds; that he, as agent, sold the remainder of the dower in this land for \$1,550.00, and, as such agent, received the money, less certain fees and expenses of sale; that he entered on her bank account the sum of \$5,000, which Ann Jack agreed to take in lieu of having her dower assigned to her.

If this \$5,000, though paid for an account of Ann Burrall to

Sturgeon v. Burrall et al.

Ann Jack, was received by Edward Burrall, Jr., as the agent of said Ann Jack, he should account for it, even though she may have had no right to any rents and profits until dower was assigned, as contended for. Her agreement that she would not claim dower, and her not claiming any rents during her life, would be a good reason why the \$5,000 should be accounted for, if Edward Burrall did actually treat it as a fund to that amount of Ann Jack, in his hands, as her agent and business manager, as alleged.

If he seeks to escape liability to account for the United States bonds on the ground that his principal made a gift of them to his wife, the latter has interest enough in this question to make her a proper party, though no case may be made for a money decree against her. If this supposed assignment was nothing more than a fraudulent contrivance on the part of husband and wife to prevent the husband from accounting for the bonds, and for inequitably depriving the nephew and niece of their interest in them, he should account notwithstanding such supposed gift, or both should.

Whether it was an actual binding gift, depends upon the mental condition of Ann Jack at the time, and it is alleged, with a great deal of alleged evidence to prove it, that she was mentally imbecile to the extent of having no will of her own, and no capacity to understand and perform business, and that inequitable means, amounting to fraud, were resorted to, to obtain the supposed gift of the bonds, and settlement at \$5,000 for the rents to which Ann Jack would have been entitled if her dower had been set off.

It seems to us that, according to the allegations of the bill, the husband was the agent and trustee, and the wife one who aided him in misappropriating for her benefit, or for that of both, the fund entrusted to his charge. Even if, under such circumstances, the fund went part into the possession of the husband, and part into that of the wife, so that equity, following it, might decree that each one should account for the portion so obtained, the bill would not, in our opinion, be multifarious for such *joinder* of two defendants, jointly engaged in misappropriating the one fund and of course not, if they were jointly liable.

Sturgeon v. Burrall et al.

There seems to be no fixed rule universally applicable, as to what constitutes multifariousness. Story's Eq. Pl. Sec. 530. After examining what this author says in Sec. 271 and following sections, and also other authorities, among them *Gaines & wife v. Chew et al.* 15 Curtis, 236 (2 How. U.S. 615), we do not consider the injustice of proceeding against both the defendants in one suit, nor the inconvenience to the court on account of too much intricacy, such as to render the joinder of both defendants a cause why the bill should be deemed multifarious.

Taking into account the charges of fraud, of undue influence, of mental imbecility, the prayer to set aside the alleged gift of the bonds, and the \$5,000 liquidation of the one-third of the rents claimed by virtue of dower, the allegations as to the fiduciary relations of the parties, and also considering the nature of the accounts of the agency, or trust, that may be required to be taken, and that such accounting may be such as could not as well be taken in a court of law, we have concluded that the case is one in which, if the allegations of the bill are true, the complainant is entitled to relief in a court of equity. *Craig v. McKinney*, 72 Ill. 305.

If the material matters contained in the bill had been more briefly stated, the court below, as well as this court, could have had a better conception of the case, and less difficulty about arriving at a correct conclusion. We hope that the bill may be amended by removing from it that portion which appears to be redundant before taking testimony under an issue made in the case.

Although it is not entirely without difficulty that we have arrived at it, our conclusion is that the bill should be answered, and in order that it may be, and a hearing had, the decree below is reversed and the cause remanded.

Reversed and remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—JUNE TERM, 1878.

JOSEPH McELHANEY
V.
THE PEOPLE, use, etc.

1. PROSECUTION FOR BASTARDY—WEIGHT OF EVIDENCE.—In prosecutions for bastardy where the prosecutrix swears positively as to the paternity of the child, and the defendant with equal certainty denies the allegations, if the parties stood upon a perfect equality in every respect, there would be no preponderance of evidence, but it must be conceded that for many reasons the testimony of one witness is entitled to more weight than that of the other, even where their interests are equally balanced, and under such circumstances the court cannot say the jury were not authorized in finding that upon this point the evidence preponderated in favor of the prosecutrix.

2. A CIVIL PROCEEDING—SETTLEMENT—BURDEN OF PROOF.—Such a prosecution is in the nature of a civil proceeding, and it is therefore competent for the parties interested to make a valid settlement of the claim, and a receipt given, expressing to be in full settlement of the case, is *prima facie* evidence of a full settlement, so that the burden of asserting the contrary is upon the party seeking to impeach the receipt, to be established by a preponderance of testimony.

3. INSTRUCTIONS—MUST BE BASED ON EVIDENCE.—It is not error to refuse an instruction where there is no evidence upon which to base it, and where, if given, it would have the effect of taking from the jury the consideration of a material fact in the case.

APPEAL from the County Court of Carroll county; the Hon. BENJAMIN L. PATCH, Judge, presiding.

McElhaney v. The People.

Mr. JAMES SHAW, for appellant; that it was competent for the parties to make a settlement of the prosecution, cited *Holmes v. The State*, 2 Green, 501; *Blackhawk Co. v. Cotter*, 32 Iowa, 125; *Coleman v. Frum*, 3 Scam. 378; *Mann v. The People*, 35 Ill. 467; *Holcomb v. The People*, 79 Ill. 409.

That it was incumbent upon the prosecution to make out a case by a preponderance of testimony, as in other civil cases: *McFarland v. The People*, 72 Ill. 368.

Upon the question of rescission of the contract as embodied in appellant's fifth instruction: *Smith v. Doty*, 24 Ill. 165; *Anderson v. White*, 27 Ill. 63; *P. M. & F. Ins. Co. v. Botto*, 47 Ill. 516; *Weintz v. Hafner*, 78 Ill. 27; *Doggett v. Brown*, 28 Ill. 493; *McPherson v. Walker*, 40 Ill. 371; *Selby v. Hutchinson*, 4 Gilm. 319; *Hogan v. Weyer*, 5 Hill, 389; *Mason v. Bovet*, 1 Denio, 69.

Mr. V. ARMOUR, for appellee; that the evidence fails to show a settlement as claimed by appellant, and upon the question of the weight of testimony upon this point; and that the verdict will not be set aside, if it is supported by the evidence, cited 11 Barb. 91; 17 Barb. 388; 3 Parker's Cr. R. 377; 7 Abb. Pr. 419; 23 Barb. 561; 28 Barb. 462; 25 Wend. 243; 17 How. Pr. 524; 11 Wend. 478; 5 Duer, 216; 4 E. D. Smith, 327; 1 Hill, 93; 13 Ill. 87; 24 Ill. 49; 32 Ill. 329; 41 Ill. 235.

SIBLEY P. J. This was a prosecution for bastardy commenced in the County Court of Carroll county, in the name of the People, by Annie M. Ike against Joseph McElhaney; where, upon a trial by jury, he was found guilty of being the father of the illegitimate child mentioned in the complaint. McElhaney, after moving the Court for a new trial, which was disallowed and judgment entered on the verdict, appealed to this Court.

The errors principally relied on for reversing this judgment are that the court below erred in giving improper and refusing to give proper instructions to the jury. The testimony upon the main question consisted of but two witnesses. That of Miss Ike who swore positively that appellant was the

McElhaney v. The People.

father of the child, and he with equal certainty denied all her statements in respect to the paternity of her offspring. If the parties stood upon a perfect equality in every respect, there would of course have been no preponderance of evidence in favor of the prosecution, and consequently it must have failed for want of sufficient testimony to support it. But it must be conceded that for many reasons the testimony of one witness is entitled to more weight than that of another, even where their interests are equally balanced. Hence, we cannot say that under such circumstances the jury were unauthorized to find upon this branch of the case that the evidence preponderated in favor of appellee.

On the trial of the cause, the following receipt was introduced in evidence by the appellant:

“Received of Joseph McElhaney, forty dollars in full settlement of the case of bastardy, now pending in the County Court of Carroll county, Illinois, wherein the undersigned is complaining witness, and Joseph McElhaney is defendant, and I hereby agree to dismiss said cause.

Oct. 8th, 1877.

ANNIE M. IKE.”

That this is in the nature of a civil proceeding and therefore competent for the parties interested to settle it, is not disputed. But counsel for the appellee insist that the effect of the receipt was destroyed, for two reasons. First, because it was obtained from Miss Ike by fraud; and second, that by a verbal agreement of the parties at the time it was understood to be a receipt for the \$40 then paid, and that McElhaney was by the 1st of December, to give his secured note for \$260 in addition to the payment made.

If either of these propositions were established by the evidence, then the receipt itself would have been no bar to the prosecution. It should, however, be kept in view that the receipt was *prima facie* evidence of a full settlement of the matter in dispute and the party asserting the contrary, should have established his proposition by a preponderance of the evidence. The same as if by way of replication to the plea of release when it was first filed (which would doubtless have been the most accurate method of proceeding), set up these

McElhaney v. The People.

been the most accurate method of proceeding), set up these facts in avoidance of the effect of the receipt. We have looked through the record in vain to discover any evidence of fraud in procuring the receipt. Miss Ike testified that she read over the receipt before signing it, and does not intimate that it was afterward altered, or that she did not at the time understand its contents. The mere suspicions of the attorney for appellee cannot prevail in the absence of any proof upon the subject.

Then what is the testimony in respect to the verbal agreement that Miss Ike says was made at the time of the execution of the receipt by which the appellant was to give his secured note for \$260 by the first of the then next December. This is positively denied by McElhaney, who stated that the amount mentioned in the receipt was all that he agreed to pay. Scott Porter, at whose house this settlement took place, and who appears to have no interest in the business, testified that on being told the matter had been settled, inquired of Miss Ike after McElhaney had left, if she had settled the difficulty with him, and she replied that she had. He then asked her what she got, and she answered forty dollars. He also (probably considering the smallness of the sum paid) remarked to her if she supposed her folks would be satisfied with that amount, she replied, "Yes;" that her father had told her that if she could see McElhaney and settle for forty or fifty dollars she should do so. She further said that it did not make any difference whether they were satisfied or not; adding that "It is our affair, and I am satisfied, and don't know why they shouldn't be."

There is not only no preponderance of evidence to destroy the effect of the receipt, but the weight of the testimony is in support of it.

The view here taken of the case does not render it necessary that we should notice all the points made by appellant in his brief, in respect to the instructions of the court. It may, however, be observed that they are not liable to the criticism to which they have been subjected. The proposition of law stated by appellant needs no citation of authority to sustain it.

McElhaney v. The People.

For, as a general rule, whenever a person desires to rescind a contract, he must return or offer to return whatever he has received by means of it, so as to place the opposite party in the same condition it was before it was entered into. But where is the evidence in this case, that Miss Ike was endeavoring to *rescind* the contract referred to in the 5th instruction which was this:

5. "That if the jury believe from the evidence that the complaining witness in this case received forty dollars from the defendant towards a settlement thereof, and if they believe that she was to have \$260 more, yet, unless she has paid or tendered the forty dollars back to the defendant, the defendant should be acquitted."

She appeared to be ready and willing to stand by, and execute on her part the contract, as she says it was made, while McElhaney had repudiated her version of it altogether. The instruction assumed that the complaining witness was seeking to rescind the contract of settlement, and therefore was properly refused. Besides, it took from the jury the question whether any settlement had been consummated. Miss Ike swore that there had been no such settlement. That she had agreed to settle with appellant if he would pay her \$40 down and give his note with security for \$260 more by the 1st of December. Hence, if he refused to comply with his part of the agreement, no settlement at all had been made.

If this was true, and the settlement agreed upon had never been finally consummated through the fault of McElhaney, can it be said that her right to proceed with the prosecution was *barred* unless she returned the \$40 received? Yet the Court was asked to say that if she had "received forty dollars of the defendant toward a settlement of the case, and that she was to have \$260 more, still, unless she had paid or tendered the \$40 back to the defendant, he should be acquitted. The prosecution was pending when the receipt was signed, and the defendant in the case was asserting that the matter had been settled, and yet it is assigned that if forty dollars had been

Convey v. Sheldon.

paid toward a settlement and \$260 more was to be paid, the defendant must be acquitted unless the complaining witness had returned the money received. Taking from the jury entirely the question of whether the agreement of appellant to pay or secure the payment of the additional \$260 and the promise on the part of Miss Ike to settle upon that condition were concurrent acts or not. If they were, then clearly no settlement had been effected. If the instruction had been based upon the fact that the receipt contained all of the agreement respecting the settlement, and that the complaining witness was seeking to overturn it on account of fraud, then the rule insisted upon relative to the rescision of contracts, might with more propriety have been submitted to the jury.

Not being satisfied with the verdict, we think the case ought to be submitted to another jury, therefore the judgment of the County Court is reversed and the cause is remanded.

Judgment reversed.

JOHN CONVEY

v.

JOHN S. SHELDON.

1. INTEREST—RATE PER CENT.—Appellant agreed with appellee, in consideration that the time for procuring a certain loan (arising from a sale of lands) should be extended until a settlement could be made with a prior mortgagee, to pay appellee interest upon the money remaining due upon the land after a certain date; but no rate of interest was agreed upon. *Held*, that appellee was entitled to recover at the rate of six per cent. only.

2. PRACTICE—REMITTITUR—COSTS.—Appellee having remitted from the judgment all above six per cent., the judgment will be affirmed for that amount, but as there was error in the record before the remittitur was entered, the costs of the Appellate Court must be taxed against the appellee.

APPEAL from the County Court of Iroquois county; the Hon. MANLIFF B. WRIGHT, Judge, presiding.

Messrs. KAY and EUANS, for appellant; objecting that an instruction was given to the jury not based on the evidence,

Convey v. Sheldon.

and the jury were neither required in such instruction to "believe nor find from the evidence," cited *Ewing v. Runkle*, 20 Ill. 448.

Mr. T. B. HARRIS, for appellee; that erroneous instructions will not reverse if substantial justice has been done, cited *Clark v. Pageter*, 45 Ill. 185; *Pahlman v. King*, 49 Ill. 266.

PILLSBURY, J. Divested of all extraneous matters in the record, the material facts briefly stated are, that in February 1876, Convey bought a tract of land of Sheldon for which he was to pay \$5,000, \$2,600 down in another tract of land, \$275 within two weeks and \$225 by May 1st, and the remainder, \$1,900 was to be paid by a loan upon the land, which Sheldon was to negotiate for Convey free of expense to Convey. The loan was to be made by July 1st, and was to be used by Sheldon in paying off a prior mortgage on the land.

The purchase price was duly paid except the \$1,900.

A short time after the sale, Convey expressed an unwillingness to pay the last installment of \$1,900 by mortgaging the land on July 1st, because Montgomery's claim to the land could not be extinguished by that time, and before he made the loan he wanted Sheldon to perfect the title by compromise or otherwise, removing any claim that Montgomery had to it.

Thereupon it was agreed that the time for procuring the loan and paying the \$1,900 to Sheldon should be extended until a settlement could be had with Montgomery and Convey should pay Sheldon interest on the money remaining due upon the land after July 1st.

The loan was perfected and the \$1,900 paid to Sheldon on January 9th, 1878.

Convey refusing to pay the interest, this suit was brought by Sheldon, and he recovered in the court below the sum of \$232.25.

The record does not show that Convey agreed to pay Sheldon any given rate of interest for the extension of the time. The law therefore declares that it shall be six per cent., and it is Sheldon's misfortune if he had to pay a greater rate upon the prior mortgage.

Noy v. Creed.

Sheldon is entitled to recover six per cent. interest on the \$1,900, from July 1st, 1876, to the time it was paid, amounting to \$73.85, and the appellee having remitted from the judgment all above that sum, the judgment will be affirmed for that amount; but as there was error in the record before the remittitur was entered, the costs of this court must be taxed to the appellee.

Judgment affirmed.

WILLIAM H. NOY

v.

ANN CREED.

1. PRACTICE—BILL OF EXCEPTIONS MUST CONTAIN ALL THE EVIDENCE.—A bill of exceptions must state that it contains all the evidence in the case, or it will be presumed that there was sufficient evidence to sustain the finding.

2. EVIDENCE—COMPETENCY OF WITNESS.—In an action by a wife for damages sustained in consequence of intoxication of her husband, caused by sale of liquor to him, the husband is a competent witness in behalf of his wife.

APPEAL from the Circuit Court of Iroquois county; the Hon. FRANKLIN BLADES, Judge, presiding.

Mr. M. B. WRIGHT and Mr. F. P. MORRIS, for appellant; that proof of actual damages should be made or exemplary damages could not be awarded, cited Freese v. Tripp, 70 Ill. 496; Meidel v. Anthis, 71 Ill. 241; Kellerman v. Arnold, 71 Ill. 632.

That the action must be brought within two years after the offense was committed: Rev. Stat. 1874, 675.

That the husband was not a competent witness in behalf of his wife: Rev. Stat. 1874, 489.

Messrs. HOLLAND & AYRES and Mr. T. B. HARRIS, for appellee; upon the question of what constitutes actual damages, cited Roth v. Eppy, 80 Ill. 283.

Weaver v. Halsey.

Against the objection to an instruction based upon the statute, which makes the owner of a building rented for saloon purposes liable: Rev. Stat. 1874, 439.

PER CURIAM.—This action was originally commenced before a Justice of the Peace by appellee, to recover damages sustained by her in consequence of intoxication of her husband, John Creed, caused by liquor sold to him by appellant.

As the bill of exceptions does not state that it contains all the evidence given on the trial below, we must presume that the evidence was sufficient to sustain the finding of the jury. *Cogshall v. Beesley*, 76 Ill. 445; *Henry v. Holloway*, 78 Ill. 356.

In this action the husband was a competent witness in behalf of his wife: *Davenport & Co. v. Ryan*, 81 Ill. 218. We find no error.

Judgment affirmed.

FRANK WEAVER

v.

AXLE HALSEY.

1. CONTRACT FOR SERVICE—DISCHARGE BEFORE EXPIRATION OF TERM—EVIDENCE JUSTIFYING SUCH DISCHARGE SHOULD BE ADMITTED.—Appellee sued appellant for damages for being discharged before the expiration of his term of service. On the trial appellant alleged, in justification of such discharge, that appellee had been guilty of indecent conduct toward a maid servant of appellant's; had made unwarranted complaint of the quality of the food furnished, and as between himself and a co-laborer shirked the work given him to perform. To support these allegations, appellant offered to show by the maid servant that she had refused, on account of appellee's conduct to her, to remain longer in appellant's service if appellee was retained; also that the character of the food was good and satisfactory to other workmen. *Held*, such testimony was competent and should have been admitted.

QUAERE—Whether the court will consider an assignment of error for failing to give an instruction asked by defendant, when the bill of exceptions fails to show that all the given instructions for defendant are in it.

Weaver v. Halsey.

APPEAL from the Circuit Court of Kendall county; the Hon. T. D. MURPHY, Judge, presiding.

Mr. JOHN A. GILMAN, for appellant; that the evidence offered should have been admitted, cited Starkie on Ev. 82; Patterson v. Gage, 23 Vt. 558.

That where instructions not based on the evidence, or calculated to mislead a jury are given, the verdict should be set aside: Adams v. Smith, 58 Ill. 417; Cusick v. Campbell, 68 Ill. 508; Carter v. Carter, 62 Ill. 439; Herrick v. Gary, 65 Ill. 101; Brown v. Graham, 24 Ill. 628; Gibson v. Webster, 44 Ill. 483; Harmit v. Thompson, 46 Ill. 460; Bullock v. Narratt, 49 Ill. 62; Bailey v. Godfrey, 54 Ill. 485; Baldwin v. Killian, 63 Ill. 550.

Upon the question of tender: Cole v. Blake, Peak, 179; Richardson v. Jackson, 8 M. & W. 298; Bull v. Parker, 2 Dowl. (N. S.) 345; Conway v. Case, 22 Ill. 139; 2 Greenl's Ev. § 605.

That where there is no evidence to sustain the verdict, or where the verdict is manifestly against the weight of evidence, the judgment will be reversed: Ill. Cent. R. R. Co. v. Chambers, 71 Ill. 519; T. W. & W. R'y Co. v. Moore, 77 Ill. 217; Carney v. Tully, 74 Ill. 375; St. Paul F. & M. Ins. Co. v. Johnson, 77 Ill. 598; C. B. & Q. R. R. Co. v. Stump, 69 Ill. 409; Chicago v. Lavelle, 83 Ill. 482; Blanchard v. Pratt, 37 Ill. 243; Koerter v. Erslinger, 44 Ill. 477; Haycroft v. Davis, 49 Ill. 455; Booth v. Hynes, 54 Ill. 363; Reynolds v. Lambert, 69 Ill. 495.

That a servant may be dismissed for causes alleged by appellant: Robinson v. Hindman, 3 Esp. 235; Spain v. Arnott, 2 Stark. 256; Gundell v. Poutigny, 4 Champ. 375; Atkin v. Acton, 4 C. and P. 208; Byrd v. Boyd, 4 McCord, 246; Lacy v. Osbaldiston, 8 C. & P. 80; Singer v. McCormick, 4 W. & S. 265; Hamlin et al. v. Race, 78 Ill. 422; 2 Chitty on Con. 843.

Upon the question of apportionment of costs: Wickersham v. Hurd, 72 Ill. 464; Lee v. Quirk, 20 Ill. 392.

Mr. J. H. FOWLER and Mr. CHASE FOWLER, for appellee;

Weaver v. Halsey.

upon the question of tender, cited Rev. Stat. Chap. 135, §§ 3, 4, 5; 2 Parsons on Con. 637; Pulsifer v. Shepard, 36 Ill. 513; Cilley v. Hawkins, 48 Ill. 305; Sweetland v. Tuthill, 54 Ill. 215.

That the verdict will not be disturbed because the evidence is conflicting: C. & R. I. R. R. Co. v. Crandall, 41 Ill. 234; Summers v. Stark, 76 Ill. 208; Keightlinger v. Egan, 75 Ill. 141.

Upon the question of apportionment of costs: Wickersham v. Hurd, 72 Ill. 464.

LELAND, J. This was an action commenced before a Justice by Halsey against Weaver, for the services of the former as a hired hand on the farm of the latter, at \$24 per month and for damages for being discharged before the expiration of the time for which he was hired, which plaintiff below claimed was from the first day of March, A. D. 1877, until after corn picking. Mr. Weaver claimed that no time was specified, except that if he kept him until after haying and harvest, he was not to discharge him then. With this exception he claimed that the contract was \$24 per month, as long as the parties agreed.

Halsey commenced work on March 1st, and on or about the 19th of March, Weaver told him he was altogether dissatisfied with him, and told him he had better go and he would hire another man, and he went.

The refusal of instructions asked by Weaver's attorney is assigned for error, but as the bill of exceptions does not show that all the given instructions for defendant below are in it, perhaps we cannot consider them; at any rate as we reverse for other reasons we pass on to the consideration of the questions properly raised in relation to the exclusion of evidence offered on the part of Weaver.

The question was whether the conduct of Halsey was such that Weaver was justified in discharging him therefor.

In order to avail himself of this excuse, if there *was* a contract that Halsey was to work until after corn picking, Weaver should show that the conduct of Halsey was improper, and that Weaver with knowledge of it discharged him.

The alleged misconduct was libidinous advances to a female

Weaver v. Halsey.

fellow servant, shirking as between himself and a male fellow servant, and unreasonable fault-finding about his food at the table, and to the maid servant who did the cooking at other times, and because she sided with her employer's family.

There was evidence tending to show that Halsey tried to get into the maid servant's room at night; that he used conversation when they were together indicating a desire for sexual intercourse, and a wish for compliance on her part, and that he called her attention to domestic animals on the farm, when the relation between these animals was such as to render joint observation of them improper and indecent.

In this condition of things Weaver offered to prove by the maid servant, that she gave notice to Mr. and Mrs. Weaver that she would leave their service if Halsey remained; that she could not on account of Halsey's indecent behavior, as a decent girl, remain if he did. The Court sustained an objection, and excluded it because it was irrelevant to the case, and there was proper exception taken.

He also offered to prove by the male fellow servant that he had had an unfair share of the work put upon him by Halsey, and that trouble had taken place between him and Halsey, and that he had told Weaver that if Halsey staid, he would leave. Upon objection of Halsey, this offered evidence was excluded and exception duly taken.

He also offered to prove that Halsey complained that the food was too thin, that he could not stand it to work on it; and to show that this was unreasonable fault-finding, by proof that the food was abundant, wholesome, well cooked and served, and fully satisfactory to the other members of the family and work hands.

The court sustained an objection by Halsey and excluded the offered evidence, and there was exception taken.

The appellee, in his brief, makes no allusion to the subject of the ruling of the court below, excluding this offered evidence.

We are unable to see any reason why the evidence was not proper and relevant. In determining whether the discharge was proper, the appellant should have taken the whole conduct

Weaver v. Halsey.

of the appellee, while he remained in his service into account, and if upon it as a whole it was sufficient, then the jury should have said he was justified. Otherwise, not.

Jurors reason differently. These different causes would produce different effects. They would not all look upon any one reason alike, and yet all of them might say readily, take them altogether, they would not blame an employer, if like the defendant below, he should be altogether dissatisfied, and conclude to get a hired man who had less defects of the kind mentioned.

We fail to perceive why the load of evidence of misconduct already in, was not enough, but if it were not, we think the court below should have allowed a few straws weight more to be added.

But it is useless to multiply words about so small a matter. The appellant could not have been induced to discharge the appellee for misconduct of which he was not aware, and of course, it was proper to show that his attention had been called to the same misconduct testified to on the trial.

As it is the misconduct as a whole, which must be taken into account at the time of the discharge, anything tending to show misconduct is proper to be taken into account as part of the whole. If it be "the last straw which breaks the camel's back," then it would not have been broken without the last straw.

All this excluded evidence ought to have gone in. We do not deem it necessary to examine and comment on the plaintiff's instructions, as this opinion is already too long for so small a case.

It is to be regretted that appellee did not, as advised by a friend, take what was due him for his work. This was offered him with the costs on the trial before the justice.

Reversed and remanded.

McLaughlin v. Gilmore.

CHARLES McLAUGHLIN

V.

DAVID GILMORE.

1. EVIDENCE—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.—The rule that prohibits an attorney from disclosing what he has learned from his client while acting in the capacity of legal adviser, was established in the interest of justice, and out of regard to the practice in the courts; the effect of the rule being, however, to suppress the truth, it is to be construed strictly, and the burden is upon the party claiming the benefit of the rule to show the communications privileged.

2. COMMUNICATIONS TO ONE NOT A LICENSED ATTORNEY.—The statute of this state recognizes only one class of persons as attorneys: those who have been admitted by the Supreme Court to practice the profession, and communications made by a party to a suit before a justice of the peace, to a person who is not a licensed attorney, with a view to such person trying the cause before the justice, are not privileged.

APPEAL from the Circuit Court of LaSalle county; the Hon. E. S. LELAND, Judge, presiding.

Mr. H. T. GILBERT, for appellant; insisting that the communication was not privileged, cited 2 Starkie's Ev. 290; 1 Greenleaf's Ev. § 239; 2 Best on Ev. § 581; 1 Phillips' Ev. 140; Wilson v. Rastall, 4 T. R. 759; Taylor v. Foster, 2 C. & P. 195. Fountain v. Young, 6 Esp. 113; Perkins v. Hawshaw, 2 Starkie, 239; Foster v. Hall, 12 Pick. 89; Pearson v. Stearly, Morris, 136; Sample v. Frost, 10 Iowa, 266; Holman v. Kimball, 22 Vt. 555; Barnes v. Harris 7 Cush. 576; Whiting v. Barney, 30 N. Y. 330; Woburn v. Henshaw, 101 Mass. 200; King v. Barrett, 11 Ohio St. 264.

Mr. R. D. McDONALD, for appellee; that the communication was privileged, cited Rev. Stat. 1845, 74 §§ 11, 12; Rev. Stat. 1874, 642, § 30; 643 § 35; Annesly v. Earl, of Anglesea, 17 How. State trials, 1139; Register Bank v. Suydam, 5 How. 254; Whiting v. Barney, 30 N. Y. 330; Mallory v. Benjamin, 9 How. Pr. 419; Bean v. Quimby, 5 N. H. 97.

McLaughlin v. Gilmore.

PILLSBURY, J. The only point submitted to the decision of court in this case is, whether the court below erred in refusing to compel the witness, Austin Smith, to answer the question propounded to him by counsel for appellant.

The appellant placed said witness upon the stand, who testified that he had a conversation with the defendant relative to his defense to the suit. He was thereupon asked by counsel for appellant to state when and where the same took place, and what the defendant said in regard to his defense to the suit. Witness then answered "that defendant, Gilmore, came to see me and consult with me about his defense to this suit, for the trial before the justice, and get legal advice of me in regard thereto, and all the conversations I have had with him about the suit have been had while I have been acting as his legal adviser and attorney in regard to the suit. I am not a member of the legal profession—that is, I am not a licensed attorney, and have never been admitted to the bar, but I sometimes practice as an attorney before justices of the peace, and take pay therefor."

Upon objections being made by defendant, that the communication of the defendant to the witness was privileged under the law, the court sustained the objection, and appellant excepted. A verdict and judgment went against the appellant, and he brings the record here, assigning for error such action of the court below.

The rule that prohibits the attorney from disclosing what he has learned from his client while acting in the capacity of legal adviser, was established in the interest of justice, and out of regard to the practice in the courts. As it became necessary to employ persons skilled in the jurisprudence of the country to manage cases in courts for litigants, it became alike necessary to establish and enforce such a rule as would protect the client in making full and free disclosures to his counsel, to enable him the better to prepare for a proper presentation of the cause to the court, or advise him relative to his legal rights, duties and obligations. As the effect of the rule, however, is to suppress the truth, it is to be construed strictly, and the burden is upon the party claiming

McLaughlin v. Gllmore.

the benefit of the rule to show the communications privileged.

Mr. Phillips, in his work on Evidence, says: "With respect to the character and situation of the party receiving the communications, it is to be observed that this professional privilege extends to the three cases of counsel, attorney and solicitor, and that it is confined to these cases, treating the agent or clerk of the attorney, or an interpreter between counsel and client, as being in precisely the position of attorney."

In Greenleaf on Evidence, section 239, the rule is stated, that in order to be protected, the communication must have been made to the counsel, attorney or solicitor, acting for the time being in the character of legal adviser. For the reason of the rule having respect solely to the unembarrassed administration of justice, and to security in the enjoyment of civil rights, does not extend to things confidentially communicated to other persons, nor even to those which come to the knowledge of counsel when not standing in that relation to the party.

In *Wilson v. Rastall*, 4 Term. Reports, 753, the court of King's Bench, while stating that in many cases, it was to be lamented that the rule was not extended to other confidential communications, yet hold that it is limited as above stated; and Shaw, C. J., in *Foster v. Hall*, 12 Pick. 89, announced the same doctrine. "Some points," he says, "seem clearly settled by the cases. It is confined strictly to communications to members of the legal profession, as barristers and counselors, attorneys and solicitors."

It is contended, however, in this case, by the appellee, that a license to practice in this State before a justice of the peace, is not required by statute, and therefore a party has a right to employ whomsoever he will to assist or advise him, or manage his cause before a justice, and having this right, it should not be abridged by withdrawing from them the shield of protection and secrecy which the law guarantees to the client in his communications with the attorney.

While it may be conceded that a litigant before a justice of the peace can employ any person he may choose to conduct his cause in that tribunal, it does not follow therefrom that such person is, for the time being, transformed into an attorney at law.

McLaughlin v. Gilmore.

The statute does not so declare him. The law nowhere invests him with the rights and privileges of such, nor impose upon him the duties and obligations of the profession. In case he should be sued by his client for malpractice before a justice, the courts would hardly hold that he must exercise that degree of skill in the management of the case that is usually attained by members of the profession. Neither would they desire that their liabilities should be measured by that standard. It is apprehended that such party is employed under the law, not as an attorney or counselor at law, but in the character of an agent merely, and as such would only be held to assume the liability of an agent.

The statute of this State recognizes only one class of persons as attorneys; those who have been admitted by the justices of the Supreme Court to practice the profession, and we are not prepared to hold that every one who may try a case before a justice of the peace is, in the law, a member of the profession.

Happily we are not without additional authority more directly in point than those above cited. In the 10th Iowa, 266, it was held that communications relating to the subject matter of a suit, made by one of the parties thereto, to a person supposed to be an attorney, with a view to engage him professionally in said suit, when such person was not an attorney at law, but was receiving business as one, and was expecting to be, and was admitted to practice at the next term of court, were not privileged. The court quoted with approbation the case of *Fountain v. Young*, 6 Esp. 113, that the person consulted must be of the profession of the law, and it is not enough that the party making the communication thinks he is.

In *Holman v. Kimball*, 22 Vt. 555, the defendant below offered in evidence the deposition of one Thomas Abbot, to prove admissions and communications relating to the suit made by the plaintiff to Abbot while he was acting as the attorney and counsel for the plaintiff. It appears that Abbot had an office and did business as a lawyer in Barton, where the plaintiff resided, and that he was employed by the plaintiff to bring the

McLaughlin v. Gilmore.

suit. Abbot's name was endorsed upon the writ as the attorney for the plaintiff, and upon the court docket in the Supreme Court upon appeal. Abbot had previously been a student in a law office, and was still pursuing his studies, but had an office and did business on his own account. He had not been admitted to the bar as an attorney at the time above referred to, but was subsequently admitted. The court below excluded the deposition, and the defendant excepted. The Supreme Court for this error reversed the judgment, holding that Abbot, not being a member of the profession, was not within the rule.

So in Wisconsin the rule is declared to be the same. *Brayton v. Chase*, 3 Wis. 456. The facts there were that the defendant proposed to have the witness disclose what Brayton had told him on a certain occasion, to which the plaintiff objected, because what he told the witness at the time referred to was told to him as the counsel or agent of said Brayton at the time he had a suit before a justice about the same subject matter; that Brayton had employed witness to try said cause for him before the justice, and to enable witness to do so he had made the disclosure, etc. It was admitted that the witness was not a licensed attorney of any court of record in the State of Wisconsin. The court say: "The communication which was made to the witness by the plaintiff was not privileged. In order to give that character to a communication, it must be made to the counsel, attorney or solicitor, acting for the time being in in the character of legal adviser. But the witness was merely employed by the plaintiff to assist him at the trial before the justice, and was not an attorney, counselor or solicitor."

We have been referred to but one case, that of *Bean v. Quimby*, 5 N. H. 94, which militates against the rule announced by the above authorities; but upon an examination of the case it will be seen that the court hold contrary to the common law rule, because of a statute of that State, which in terms authorizes any one to commence and manage any cause in any court when employed to do so by another. The decision being based upon a statute of that State, cannot be considered as seriously affecting the common law rule in force in this State, for we have seen our statute has not changed such rule. Our

Jefferson v. Barkto.

conclusion is, that under the circumstances in this record, the communication to the witness Smith was not privileged. Such in our judgment is the law. With its policy we have nothing to do. If the rule should be extended further, the Legislature must so provide.

Let the judgment of the court below be reversed and the cause remanded.

Judgment reversed.

LELAND, J., having tried this cause in the court below, took no part in the decision.

ALEXANDER JEFFERSON

v.

ANDREW BARKTO.

1. CHATTEL MORTGAGE—WHEN TITLE VESTS.—After condition forfeited in a chattel mortgage, the title to the property becomes vested in the mortgagee, and the fact that the mortgage contains a provision that the mortgagee shall have the right to take possession of, and sell the property mortgaged at public or private sale, does not prevent the property from vesting in the mortgagee, or a purchaser from him.

2. VALIDITY NOT AFFECTED BY IRREGULARITY IN SALE.—An irregularity in the sale of the mortgaged property would not affect the validity of the mortgage, or deprive the mortgagee or his assignee of the right to take possession of the mortgaged property.

APPEAL from the Circuit Court of Livingston county; the Hon. N. J. PILLSBURY, Judge, presiding.

Messrs. CHUBBUCK & DOMINY and Mr. J. W. STREVELL, for appellant; that the action being trover, appellee must have possession or such an interest as gives him the right to immediate possession, cited Owens et al. v. Weedman, 82 Ill. 409; Davidson v. Waldron, 31 Ill. 129.

That upon condition broken the title vests in the mortgagee: Simmons v. Jenkins, 76 Ill. 479.

Jefferson v. Barkto.

That trover will not lie against an officer for taking mortgaged property under process: *Pike v. Colvin*, 67 Ill. 227.

Mr. L. E. PAYSON and Mr. WALTER REEVES, for appellee; that a *bona fide* purchaser without notice from the purchaser at a foreclosure sale, is not required to enquire whether the sale was regular, cited *Wylder v. Crane*, 53 Ill. 490.

SIBLEY, P. J. It appears that two trials were had in the Circuit Court in this cause, and on the second one, the record shows that in March, 1877, Andrew Barkto brought an action of trover in the Livingston Circuit Court against Alexander Jefferson, to recover the value of a house which by agreement of the parties was treated as personal property.

Before the plaintiff could succeed in this form of action, it became necessary for him to establish the ownership of the property, and that the defendant converted it to his own use.

Jefferson on the trial by way of defense, offered a mortgage executed by Barkto on the 21st of March, 1876, to Martin F. Overhold and Francis Holmes, for the purpose of securing a promissory note of that date, made by Barkto to Overhold and Holmes, and payable in six months after its date for the sum of two hundred dollars. The note and mortgage were afterward assigned to Zotham Baily, and were together with the assignments thereon, read in evidence to the jury by the appellant.

The jury after hearing the testimony, found the defendant guilty, and assessed the plaintiff's damages at \$200.

A motion was then made by the defendant for a new trial, which was overruled by the court, and the defendant prayed an appeal to this court. Among the several errors assigned by the appellant, but one of them will be considered.

The Circuit Court was requested by the defendant in that court to give the jury the following instruction:

"The court instructs the jury for defendant, that if they find from the evidence in this case, that the debt secured by the mortgage was due and unpaid by Barkto at the time of the commencement of this suit, then in that case, the mortgagees

Jefferson v. Barkto.

or their assigns would be entitled to the possession of the property named in the mortgage, and such right being adverse to the right of the plaintiff, he cannot recover in the present action of trover," which the court refused to give.

The instruction contains a correct proposition of law, for the rule is well settled, that after condition forfeited in a chattel mortgage, the title to the property became vested in the mortgagee, and the fact that the mortgage, as in this case, contains a provision that the mortgagee should have the right to take possession of, and sell the property mortgaged at public or private sale, does not prevent the property from vesting in the mortgagee or a purchaser from him. *Durfee v. Grinnell*, 69 Ill. 371; *Simmons v. Jenkins*, 76 Id. 476. Nor would any irregularity in the sale of the mortgaged property affect the validity of the mortgage, or deprive the mortgagee or his assignee, of the right to take possession of the mortgaged property. *Hanford v. Obrecht*, 49 Ill. 146.

Then if the debt which the mortgage was given to secure, was still due and unpaid when the mortgagor commenced suit to recover the value of the property mortgaged, and the condition in the mortgage was forfeited, the mortgagor ceased to be the owner of it, and the mortgagees, or the persons claiming through them, became absolutely invested with the title to the property. Hence it was error to refuse the instruction. For this reason the judgment will be reversed, and the cause remanded.

Judgment reversed.

The first trial in this cause having been before PILLSBURY, J., he took no part in the decision of the cause in this court.

Burritt v. Tidmarsh et al.

HIRAM B. BURRITT
v.
WILLIAM TIDMARSH ET AL.

1. PAYMENT OF JUDGMENT—NOTICE OF ASSIGNMENT—BURDEN OF PROOF.—Plaintiff in error settled and paid a judgment recovered against him by one of the defendants in error. Defendant in error Searls claimed that the judgment in question had been assigned to him previous to such payment, and that plaintiff in error had notice of such assignment before making payment. *Held*, that the burden of proof was upon defendant in error to show such notice.

2. CONSIDERATION RECEIVED MUST BE RETURNED.—It seems that defendant in error Tidmarsh had received from plaintiff in error full payment of the judgment in question, and before he or his pretended assignee Searls can repudiate such settlement there must be a return, or offer to return, of the consideration paid.

3. NEGOTIATION FOR FUTURE ASSIGNMENT.—From the evidence it is clear that if there was any talk between defendants in error in relation to the judgment, it was to the making thereafter an assignment, rather than an actual parol transfer or pledge of the judgment.

ERROR to the Circuit Court of Lake county; the Hon. T. D. MURPHY, Judge, presiding.

Mr. E. M. HAINES and Mr. H. C. IRISH, for plaintiff in error; that intoxication is no ground for setting aside a transaction unless it be shown that such intoxication was procured or induced by the party seeking a benefit; and upon the degree of intoxication that will avoid a transaction, cited *Bates v. Ball et al.* 72 Ill. 108; *Van Horn v. Keenan et al.* 28 Ill. 445.

That an assignee of a non-negotiable chose in action must notify the debtor of such assignment if he would protect himself from payment to the original creditor, and the burden of proof is on the assignee to show such notice: *Hermans v. Ellsworth*, 64 N. Y. 159.

An assignment of so much of the judgment as would pay the fees of defendant in error, would not effect the payment of the judgment to the original creditor. Judgments cannot be assigned in part without the assent of the judgment debtor: *Freeman on Judgments*, 356.

Burritt v. Tidmarsh et al.

Upon the effect of an assignment of a judgment as to the rights of the parties to the record: *Hossack v. Underwood*, 55 Ill. 123; *Hughes v. Trahern*, 64 Ill. 48; *McJilton v. Love*, 13 Ill. 486; *Allen v. Watt*, 78 Ill. 284.

That injunction is the proper remedy in this case: *Scott v. Shreve*, 12 Wheat. 605; *High on Injunctions*, 68.

Mr. W. S. SEARLS, for defendants in error; that it is too late in this court to make objection to depositions read on the hearing without objection, cited *Webb et al. v. Alton, M. & F. Ins. Co.* 5 Gilm. 223; *Vasey v. Board of Trustees, etc.* 59 Ill. 188; *Sawyer v. City of Alton*, 3 Scam. 127; 1 Greenl'f's Ev. § 421.

That a wife can be a witness in all cases in which her husband could be a witness: *Freeman et al. v. Freeman*, 62 Ill. 199; *Ill. Cent. R. R. Co. v. Taylor*, 24 Ill. 323; 1 Greenl'f Ev. § 342.

That payment of the judgment could not defeat the rights of the assignee: *Hansen et al. v. McConnell*, 12 Ill. 170; *Dixon v. Buell, adm'r* 21 Ill. 203; *Hitt v. Ormsbee et al.* 12 Ill. 166; *Carr v. Waugh*, 28 Ill. 418; *Wheeler v. McCorriston*, 24 Ill. 40; *Hughes v. Trahern*, 64 Ill. 48.

Upon the question of intoxication as affecting payment of the judgment: *Murray v. Carlin*, 67 Ill. 286; *Van Horn v. Keenan et al.* 28 Ill. 445; 2 White. & Tudor's L. Cas. 1036; 1 Story's Eq. Jur. 228.

LELAND, J. This was a bill in equity, in which the complainant, H. B. Burritt, stated that a judgment was recovered by Tidmarsh against Burritt, impleaded with John R. Wells and Reuben C. Hill, for \$500 damages, and costs of suit, February 17, 1872.

That on August 24, 1872, Burritt and Tidmarsh, with intent to avoid a pending appeal from said judgment in said suit and further litigation and expense therein, settled said judgment and costs, whereby Burritt paid the same; and thereupon said Tidmarsh gave to Burritt a full release, discharge and satisfaction of said judgment and costs, bearing date on said day.

Burritt v. Tidmarsh et al.

That Tidmarsh, in consideration of such settlement, then agreed with Burritt to discharge and release said judgment upon the records of said court at once, which he failed to do.

That Burritt caused the release executed by Tidmarsh to be filed in the office of the clerk of the court where such judgment was rendered, on the 26th of August, 1872.

That Burritt considered the judgment settled and satisfied, and hence did not prosecute his said appeal.

That after Tidmarsh had settled said judgment with Burritt, and received the consideration therefor, he pretended to assign the same to W. S. Searls, his attorney, with intent to defraud complainant. That at the time of said assignment, Searls knew the judgment had been fully settled and satisfied; and that Tidmarsh had executed the release to Burritt above mentioned; and that after the assignment of the judgment to Searls, the said Searls and Tidmarsh, without complainant's knowledge, procured the dismissal of said appeal in Supreme Court, with five per cent. damages.

That after dismissal of the appeal, Searls and Tidmarsh caused execution to be issued on said judgment, and that the same is now about to be levied. The bill prayed for an injunction restraining levy of execution and for general relief, and there was an order for an injunction.

The answer of Tidmarsh admits the recovery of the judgment against Burritt, and the appeal by Burritt.

Denies the settlement of the judgment with Burritt, and charges that before said 24th day of August, 1872, he had repeatedly told Burritt that he, Tidmarsh, had let his attorney, Searls, have the judgment.

That some negotiations were talked of, to settle said judgment, but defendant never signed the release mentioned in said bill of complaint, and finally broke off such negotiations, and soon after made a written assignment of said judgment to Searls.

That he did not know the contents of the paper signed by him, and that if such paper was the release aforesaid, that the same was fraudulently obtained from him, and that the same was delivered to Burritt to be presented to Searls for his sanc-

Burritt v. Tidmarsh et al.

tion. Denies that Searls had knowledge of settlement of judgment. Denies that judgment was assigned to Searls to defraud complainant.

The answer of Searls admits obtaining the judgment against Burritt and the appeal, charges that appeal was taken for delay. Denies that complainant paid to Tidmarsh any consideration upon settlement of such judgment; denies that any settlement was made; denies that Tidmarsh executed the release mentioned for the purpose of settlement of said judgment; charges that complainant, while Tidmarsh was intoxicated, persuaded him to sign such release. That Tidmarsh finally broke off negotiations for settlement.

Charges that at the time the release was filed in court, complainant Burritt knew the judgment had been assigned to Searls. Denies that the assignment of judgment to him was after the settlement with Burritt.

Charges that Tidmarsh had no right to settle said judgment without consent of Searls, which Burritt well knew.

Denies that the assignment of judgment to him was without consideration, and alleges that Tidmarsh was indebted to him, for which he assigned the judgment and in payment of his fees.

Denies that he knew of the settlement of the said judgment at time he took such assignment.

Admits that he procured dismissal of appeal in Supreme Court.

Admits the issuing of executions.

Denies generally the allegations of fraud in said bill.

Exhibit "A" being assignment of judgment, Tidmarsh to Searls, is referred to in answer.

The answer of Geo. H. Bartlett, the officer, admits the recovery of the judgment against Burritt.

Admits receiving executions on said judgment, and on judgment in Supreme Court, and that same are still in his hands unpaid and unsatisfied.

The evidence shows without conflict that on the 25th of August, 1872, the defendant, Tidmarsh, and the complainant, Burritt, met at the office of John R. Wells, and agreed upon the terms upon which the \$500.00 judgment was to

Burritt v. Tidmarsh et al.

be released and discharged by Tidmarsh. Burritt was to pay him \$300 in money and draft, release a judgment of about \$100 which Burritt had against Tidmarsh. A \$100 note which Wells held against Tidmarsh was to be given up, and a \$25 church subscription made by Tidmarsh was to be paid for him and given up. The 25th being Sunday, and the question of the legality or propriety of a business transaction on that day being raised, the papers were executed as bearing date on the 24th, and on Monday morning, the 26th, Wells paid Tidmarsh \$10 in money, gave him a draft for \$290, the release in writing of the judgment against Tidmarsh; and the payment of the church subscription was arranged. The \$100 note could not be found by Wells, but he was to give it up when found, which Wells says was satisfactory to Tidmarsh, and the judgment releases were delivered and the transaction completed. On the 26th Burritt filed the release of the \$500 judgment in the clerk's office at Wankegan.

There is no allegation in the answer of Tidmarsh or Searls of a return of the money and papers received, or of an offer to do so. The wife of Tidmarsh, however, went to the table where Burritt was at dinner at the hotel, and left some papers by his plate, and said "here are your papers." Burritt did not take them. Mrs. Tidmarsh says she delivered them at the request of her husband. Burritt never took the money or papers back, and it is apparent that Tidmarsh has kept the consideration paid him by Burritt and Wells for the release of the \$500 judgment.

The only defenses to the bill of the complainant are:

1st. Tidmarsh was not sober enough to transact the business and release the judgment; and 2d, that Burritt knew when he paid and satisfied the judgment and took the release, that Searls owned it or had some interest in it.

As to the first, we only deem it necessary to say that the evidence preponderates greatly in favor of the complainant; that the defendant Tidmarsh, though a man who used intoxicating drink too freely at times, was sober enough on Sunday at the time the negotiation was concluded, and on Monday when he

Burritt v. Tidmarsh et al.

received the consideration, for the transaction of all the business understandingly.

As to the second, all that is necessary to be said is that the assignment of the judgment was after it was satisfied and released; that the answer of Searls does not distinctly set up any claim to it by a parol arrangement between him and Tidmarsh, but claims that his written assignment was prior to the satisfaction of the judgment, and that Burritt had notice of the written assignment, not of the supposed oral one.

It seems clear that if there was any talk between Tidmarsh and Searls on the subject, it was in relation to the making thereafter an assignment to secure his fees as an attorney, rather than a parol pledge or transfer of any interest in the judgment; negotiation for a future assignment rather, than an actual parol transfer or pledge of the judgment.

If, however, there was anything which might be called a verbal transfer or pledge by Tidmarsh to Searls of the judgment as security for the fees of the latter, made before the assignment, the burden of proof was on the defendant Searls to show it.

After a careful consideration of the evidence of Burritt, Tidmarsh, Wells and Searls, which is all there is on this subject, we are unable to perceive that the positive and distinct statement of Burritt that he did not know that Searls had any interest in the judgment at the time he paid it and obtained the release of it, is disproved.

On the whole, we think that the evidence slightly preponderates in favor of the position that he paid the judgment in good faith, with no notice of any claim of Searls, and it seems to us that Searls, prior to the assignment to him, had no other interest in the judgment than that of an attorney of the plaintiff, who hopes and expects to collect it, and get his fees out of the sum collected.

If we should treat the evidence of Searls and Burritt as equally balanced, we do not think Tidmarsh has disturbed the equilibrium. Though he could not under all circumstances balance himself, he has certainly succeeded in doing so as a witness on the subject whether Burritt had notice of the supposed claim of Searls, by stating it both ways.

Hayward et al. v. Catton.

The decree is reversed and the cause remanded, with instructions to the court below to decree a satisfaction of the \$500 judgment, and a perpetual injunction against its collection by execution or otherwise.

Reversed and remanded.*

EDWARD HAYWARD ET AL.

v.

JOSEPH CATTON.

1. PRACTICE—DEFECTIVE BILL OF EXCEPTIONS.—A bill of exceptions signed by a judge, with delegated authority to a reporter to write out his notes, and to a clerk to admit them when written out, to be placed among the files, and inserted in the record in the shape of skeleton notes, with a skeleton bill of exceptions, cannot be tolerated. It amounts to nothing more than a statement that there was evidence presumably enough.

2. GENERAL EXCEPTION TO A SERIES OF INSTRUCTIONS.—A general exception to a series of instructions is like a general demurrer to a declaration; if there are some good instructions, the exception cannot be noticed in the Appellate Court.

APPEAL from the Circuit Court of Peoria county; the Hon. D. McCULLOCH, Judge, presiding.

Messrs. HOPKINS & MORRISON, for appellants.

Mr. S. D. PUTERBAUGH, for appellee; that in order to bring the evidence offered on the trial before the Appellate Court, it

*NOTE BY THE COURT. This Court having affirmed the decision of the court below overruling the motion made to recall the execution on the \$500 judgment, and declare the judgment satisfied (in which case the facts and parties are the same as in this), we deem it proper to state that though the remedies by bill in equity and motion at law may be concurrent (*Babcock v. McCamant et al.* 53 Ill. 214), we do not deem it proper that they should be ontemporaneously or successively pursued.

Inasmuch, therefore, as the proceedings in the chancery case were set up as a reason why the motion at law was barred, and should not be entertained, and as the decree dismissing the bill was before the making the motion, and was really a bar, we sustain the decision below for that reason only, though we would otherwise have reversed it. There was no necessity for again vexing the defendants in the bill for the same cause.

The complainant Burritt should have sought his remedy under Sec. 21 of Chap. 69, Rev. Stat. 1874.

Hayward et al. v. Catton.

must be contained in a bill of exceptions, signed and sealed by the judge, cited *Moss v. Flint*, 13 Ill. 570.

LELAND, J. This was an action of debt by appellee against appellant on two injunction bonds.

The record is in a most remarkable condition. The first 842 pages, without any preceding placita, seems to be composed of a reporter's notes of evidence, without anything to indicate that they belong to this case, except that the names of the parties seem to be the same, the lawyers the same, and the subject matter a similar one, and the judge the same. "By whom and when these notes of evidence were made, transcribed and paged, does not appear anywhere on the face of these 842 pages." At the commencement of the notes are these words: "State of Illinois, Peoria County, ss.; in the Circuit Court, to October term, A. D. 1877. Joseph Catton v. Edward Hayward. Trial before Hon. D. McCulloch and a jury;" which are the first words in the supposed record. Immediately following these notes, we find the placita in the usual form for the May term, 1877, of the Peoria Circuit Court, marked page 1.

On page 2 of the new paging, the declaration filed April 6, 1877, commences, ending on page 16. On 17 and 18, a summons against Hayward alone, with service. On 19, a bond for costs. On 20, a stipulation about evidence without issues. On page 21, an exact copy of the placita on page 1. On 22, an order in relation to security for costs. On page 23, placita for October term, 1877. On pages from 24 to 35, inclusive, we find various record entries, among them a verdict, Nov. 23, 1877, and judgment, Nov. 25, 1877, against Hayward only, and order allowing twenty days to file bill of exceptions.

On page 36 is found the commencement of that which purports to be a copy of a bill of exceptions, filed Dec. 17, 1877, a portion of which we deem it necessary to transcribe, in order to make ourselves understood clearly, viz: "Be it remembered, that this day being one of the days of said term, this cause coming on for trial in said court upon the issues joined upon the merits, the parties respectively, to maintain the issues on

Hayward et al. v. Catton.

their respective parts, examined the witnesses whose names are set down and shown to have been examined in the report of the testimony and trial of the case of Mr. Watson, the short-hand reporter of this Court, and that said witnesses testified, respectively, as then in writing; and that the said parties, respectively, offered and gave in evidence the documentary evidence and papers, as shown in and by said short-hand reporter's report. And the court made the rulings and decisions during the trial of said cause, as set down and shown in said report, and that at the time of said trial, and at the time all such rulings and decisions were made, the party against whom the same were made, then and there objected and excepted thereto; and said Watson's short-hand report, written out and filed, or to be filed in said court, is made a part hereof. [Here insert it.] And this was all the evidence in the case offered by either party."

Without anything being inserted here, and without any certificate of the judge, other than as aforesaid, as to what should be inserted, next follows copies of thirteen instructions for plaintiff marked, given on the margin, with this at the end: "To the giving of which the defendant then and there objected and excepted"—not a several objection to each, but a joint one to all. Next follow copies of thirteen given instructions for defendant. Then follow, as near as they can be counted (some unnumbered, some with similar numbers, and some where it is a little difficult to tell whether they are whole ones, or parts of others), about nineteen refused instructions for defendant; some with the word "refused" on the margin, and some not. At the end of these last is this expression: "But the court then and there refused to instruct the jury, or to give them any or either of said last named instructions, to which refusal the defendant then and there objected and excepted." Whether these nineteen refused and thirteen given instructions were all that were asked by defendant, doth not appear.

It is then stated in the bill of exceptions that the jury returned into court their verdict as follows: [Here insert.] And the clerk has taken the liberty to add the verdict to the words "Here insert," instead of substituting it for them. Next

Hayward et al. v. Catton.

follows the motion for a new trial, with a copy of the reasons therefor; and at the end of all, the following: "And inasmuch as the matters and things aforesaid do not appear fully of record in said cause, defendant prays that this bill of exceptions may be signed and sealed—which is done."

D. M'CULLOCH, *Judge*. [L. s.]

We have no means of knowledge as to when, exactly, the supposed reporter's notes were transcribed, nor when they were placed on file. The clerk certifies, on the 17th of December, 1877, that they are not there then, and on the 31st of December, 1877, that the amendment of the record hereto attached, marked "Report of trial," is a full and correct transcript of the shorthand reporter's report called for, and referred to in and by the bill of exceptions aforesaid, as the same appears on file in my office." It is palpable that the filling up the blank in the bill of exceptions with the evidence, was by delegation of that power to others by the judge, and that the notes were written out after the signing the bill.

The record, with its pages last mentioned, from 1 to 78, was filed December 19, 1877, and thereafter the reporter's notes were added at the beginning, with its paging from 1 to 842, under a leave to withdraw the record for amendment, and which amendment was filed on January 1st, 1878. The court, perhaps, ought not to have permitted this, but should have had it filed as an amended detached record, and then we would have had the skeleton bill of exceptions in the original record, and the skeleton reporter's notes in the amended one. That the reporter's notes were not transcribed when the bill of exceptions was signed by the judge, is self evident from the record. It is also proved *aliunde* by an affidavit of appellant's attorney, sworn to on the 18th of December, 1877, and used in support of a motion for leave to file additional parts of the record, in which it is stated that the reporter has commenced within the last day or two, but is now writing up the same as fast as possible.

In the foregoing condition of the record, we feel compelled to say that, as we understand the great weight of authority, the evidence cannot be judicially seen by an appellate tribunal.

That, by the bill of exceptions, it appears that there was evidence in the trial below, but that it does not appear what that evidence was. That it would be dangerous in the extreme to tolerate a skeleton bill of exceptions with delegated authority to have evidence thereafter to be transcribed, or even to be thereafter placed on file if already transcribed.

There is no other strictly safe and accurate way, except to have the bill perfect when it is signed, like any other pleading in a cause; but in this labor-saving age, reference to instructions or depositions on file, or other papers made parts of the bill unmistakably by reference, perhaps may be tolerated, though some courts have doubted the propriety of any reference to documents, papers, or any outside writings not actually attached to and made part of the bill; that is, that any skeleton bill is improper. We refer to the following cases on the subject:

Leftwick v. Lecam, 4 Wall. (N. S.) 187; Garlington v. Jones, 37 Ala. 240; Fisher v. Guscha, 5 Clark, Iowa, 472; Burlington Gas Co. v. Greene, 21 Iowa, 335; Wyman v. Ward, 25 Me. 436; Moulding v. Rigby, 5 Miss. 4 How. 222; Carmichel v. Beawden, Id. 431; Wells v. Martin, 1 Ohio State, 386; Busby v. Finn, Id. 409; Judd v. Noggle, 16 Wis. 333; Orton v. Woman, 19 Wis. 350; Harmon v. Chandler, 3 Clark (Iowa), 150; Frost v. Bates, 16 Vt. 145; Branch Bank Co. v. Mosely, 19 Ala. 222; Thomas v. Wright, 9 S. & K. (Pa.) 90; Humphrey v. Barge, 1 Greene (Iowa), 223; Reed v. Hubbard, Id. 153; A. & N. Railroad Co. v. Wagner, March No. 1878, Am. Law Register, 180; City of Jefferson vs. Opel, 7 Central Law Journal, 46.

When we look at the reporter's report of the trial, as it is called, we find this is a skeleton also. Skeleton upon skeleton—a very graveyard of justice, if such things are to be tolerated. On page two we find, "Plaintiff's counsel offers the original bill of Joseph Catton, in the case of Joseph Catton v. Edward Hayward, filed on the 11th day of January, 1876. Objected to." Also, "The cross-bill filed by Edward Hayward against Joseph Catton, on the 28th of January, 1876, upon which this injunction was issued. Objected

Hayward et al. v. Catton.

to." What the Court did about these objections *non constat*.

On page three, "Plaintiff's counsel offers in evidence the injunction bond tried on this case, dated January 28th 1876, marked Exhibit 3, as follows: [Here insert.] Objected to as incompetent. Objections overruled. Defendant then and there excepted. On the same pages, "Plaintiff's counsel offers in evidence, the order of the court for injunction made in the case of Hayward v. Catton, on the 28th of January, 1876. Objected to." What was done with the objection, whether ruled in or ruled out, *non constat*. Other proceedings and papers in the Chancery Cause are offered, and finally the court said: You can offer all the papers that you wish to put in evidence, and I will examine them and pass upon them to-morrow morning (at least Watson reports that this was so), and thereupon the whole chancery case was offered. It would seem from report that the foregoing events were on Nov. 15, 1877. On the 16th, according to the report, the court said: "The papers taken by the court last night are admitted as proper evidence to the court, but not proper to go to the jury." Whether the plaintiff's cause of action, the two bonds declared upon, ever got into the case or not, *non constat*, by the skeleton bill, nor by the skeleton report. It may be inferred that they did, because the plaintiff had no case without them, and because in another addition to the record filed January 15, 1878, the clerk below by certificate of that date, says that the injunction bond, dated Dec. 6th 1876, penalty \$500; injunction bond, dated June 28th 1876, are further parts of the record remaining in my office in the case of Joseph Catton v. Edward Hayward, and copies are given with no appearance of filing on either one.

Whether the papers mentioned were found by the clerk in the bundles of papers belonging to the suit on the bond, or to the one in the chancery suit, does not appear. All of them are parts and parcel of the chancery suit, and probably were taken from the files in the latter. It hardly requires a citation of authorities from other States to show that a bill of exceptions signed by a judge, with delegated authority to a reporter to write out his notes, and to a clerk to admit them when written

out, to be placed among the files, and to substitute 842 pages thereof in the shape of skeleton notes, with skeleton exceptions in a bill of exceptions in the lieu and stead of the three words "Here insert it," is fraught with too much danger to be tolerated, and to show that such a bill of exceptions amounts to nothing more than a statement that there was evidence presumably enough. There is great danger that the statement thus made in advance, that the bill contains all the evidence, may really be in the Appellate Court, the converse of a self-evident truth. The following are two of our own cases on the question: *Cullener v. Nash*, 76 Ill. 515; *Cogshall v. Busby*, Id. 445.

It is not necessary to cite authority to show that the clerk's certificate as to what was the evidence on the trial, amounts to nothing.

The case in the Am. Law Register is a well considered one, and in which many of the authorities above mentioned are cited.

The exceptions to the instructions given for the plaintiff, and refused for defendant, being in each instance a general one at the end, is according to the authorities, like a general demurrer to a declaration.

If there be one good count in the last named case, the demurrer must be overruled; and in the first, if there be some good instructions, the exception cannot be noticed in the Appellate Court. We refer to the following cases on this subject:

Lincoln v. Claflin, 7 Wall. (N. S.) 132; *Garrigan v. Barnett*, 7 Ind. 528; *Terloff v. Honevenlenger*, 21 Iowa, 429; *Redman v. Malvin*, 23 Id. 296; *Reynolds v. Boston & R. R. Co.* 43 N. H. 580; *Oliver v. Phillips*, 21 N. J. L. (1 Zab.) 597; *Howland v. Willitts*, 9 N. Y. (5 Seld.) 170; *Oldfield v. Harlem R. R. Co. N. Y.* (4 Kenn.) 310; *Robinson v. N. Y. & Erie R. R. Co.* 27 Barb. 512; *Conk v. Camfield*, 31 Ind. 171; *Agee v. Medlock*, 25 Ala. 281; *Barker v. McGinness*, 22 Ind. 257; *State v. Chapin*, 10 La. An. 458; *Ellis v. The People*, 21 How. (N. Y.) pr. 356; *Goodwin v. Perkins*, 39 Vt. 598; *Haslet v. Moss*, 28 Ind. 354.

Stilson v. Harger et ux.

We do not deem it necessary, however, to decide this last point. Notwithstanding all the foregoing difficulties in the way, we have endeavored to look at the case as though they did not exist, and it seems to us that substantial justice has been done. We have, therefore, concluded to affirm the judgement.
Affirmed.

SAMUEL T. STILSON, Impl'd, etc.

v.

HENRY H. HARGER ET UX.

ALLEGATIONS OF A BILL MUST BE SUPPORTED BY PROOF.—This was a bill in chancery, brought by appellee and wife, to compel the cancellation and surrender of a certain note and mortgage held by appellant. The court finds that the preponderance of evidence is against the allegations of the bill, and the case is reversed and bill dismissed without prejudice.

APPEAL from the Circuit Court of LaSalle county; the Hon. EDWIN S. LELAND, Judge, presiding.

Mr. E. F. BULL, for appellant.

Messrs. RICHOLSON & SNOW, for appellees.

SIBLEY, P. J. In March, 1867, Henry Harger, being the owner of a 170 acre farm in DeKalb county, and pressed for means to make such a defense to some suits pending in the Federal Court, at Chicago, respecting the title to or liens upon the property as he thought necessary, in order to obtain the desired means, conveyed the land to Samuel T. Stilson, by deed of general warranty, absolute upon its face, though Harger testified that it was intended as a mortgage to secure present and future advancements by Stilson.

This allegation is, however, denied by the latter in very positive terms, who asserts the sale was a complete and *bona fide* one, without any condition. That he advanced \$500 to

Stilson v. Harger et ux.

Harger, and took the farm subject to the suit and incumbrances upon it, including costs and attorney's fees.

That he was at considerable expense in defending the suit in the U. S. Court, where a decree was finally rendered for a portion of the demand claimed, which he paid off, together with a large amount of costs and attorneys' fees. The DeKalb county farm was afterward, in 1870, sold and conveyed to Moses Bartlett for about \$6,000, \$2,000 down and notes given for the balance, which were subsequently collected by Stilson. In March, 1871, Harger purchased of a Mr. Wordan, a 40 acre tract in LaSalle county, for some \$2,152, which it appears was subject to an incumbrance held by Samuel C. Wiley for \$1,000 or \$1,100. Harger states that Stilson at the time was owing him upon their dealings a balance sufficient to pay for the LaSalle county land, including the mortgage held by Wiley, which he avers Stilson agreed to satisfy.

At the time of this trade with Wordan, Harger and wife gave to Stilson a note secured by a mortgage upon the land purchased of Wordan, for \$1,000. Harger testified that this mortgage was given to Stilson to secure him from any liability he may have incurred by means of having executed a deed with covenants of warranty to the title of the DeKalb county farm, ten acres of which had been previously sold for taxes, and a deed executed upon the certificate of purchase issued.

This is a bill in chancery, brought by Harger and wife against Stilson, to have the mortgage and note given by the former to the latter surrendered and canceled, and the Circuit Court decreed according to the prayer in the bill. Stilson appealed to this court, and has assigned two errors: one, for refusing to dismiss complainant's bill, and the other for ordering the note and mortgage held by Stilson to be surrendered up and canceled.

The record is quite voluminous, but the testimony can be reduced to within a pretty narrow compass. Harger's evidence substantially supports the allegations of the bill, and in some unimportant particulars is perhaps corroborated by the testimony of other witnesses in the case. But upon the main question, that the only consideration for the note and mortgage to

Stilson v. Harger et ux.

Stilson was simply to indemnify him against any liability that might arise from his having executed a deed with covenants of warranty for the DeKalb county farm, the testimony of Harger remains unsupported by any material evidence, and is flatly contradicted by Stilson in every particular, who swears that at the time of the purchase of the land from Wordan by Harger, that he did not owe the latter a single dollar. But as Harger was without means, and desired to purchase the property, he voluntarily, as a mere gift, contributed \$1300 toward the purchase, and loaned Harger \$1,000 to make up the balance required, taking from him a note and mortgage to secure its re-payment. That he knew nothing of the Wiley mortgage until long after the sale, and never agreed with Harger or any one else to pay it off.

In respect to the allegation in the bill that Harger was not indebted to Stilson on the execution of the note and mortgage in question, and that the only consideration for them was the covenants of warranty in the deed by Stilson to Bartlett for the DeKalb county farm, Stilson is supported in the denial of this charge by the testimony of the witness, Chase (a justice of the peace before whom Harger upon expressing some dissatisfaction relative to their former arrangement, desired to go for the purpose of having a more correct figuring), who states that in December, 1873, Harger and Stilson came to his office to look over their matters in difference. That they commenced comparing their accounts, and getting into some dispute, and Stilson left the office.

After Stilson left, Chase, at the instance of Harger, took down the items of account existing between the parties as Harger gave them to him, allowing to each interest, as directed. The result upon his figuring showed that Harger owed Stilson \$676, and Harger remarked that that was the way their matters stood.

Chase also states that he drew the mortgage from Harger and wife to Stilson, and heard nothing at the time said by Harger about Wiley's having a mortgage on the place, nor that the consideration of the instrument then executed was fictitious, but understood it to be *bona fide*.

Stilson v. Harger et ux.

Haight, who furnished the money to Stilson, that went to pay Wordan for the forty-acre tract, testified that he understood Stilson was to take a mortgage from Harger on the land for the money furnished, and his impression was that Harger conveyed the idea that neither Stilson nor himself knew of the Wiley claim. .

The proof relied on to contradict Stilson, that he afterward told Wiley if his mortgage was good he would pay it off, loses much of its force when it is recollected that this conversation took place a year or more after the sale by Wordan to Harger, and after Wiley had threatened to foreclose his mortgage. Under such circumstances it would not be at all strange that he should make the promise to pay off the claim, although he was under no obligation to do so. Since the Wiley mortgage had priority over his own, it became necessary for him to extinguish the debt, or permit the land to be sold to satisfy the lien upon it.

If the consideration of the note and mortgage executed by Harger and wife to Stilson was as the former has stated it, the reason given for not having it recited correctly in the instrument itself is far from being satisfactory. But suppose it to be as set out in the bill of complaint, still the court erred in decreeing a surrender and cancellation of them until some proof was made that Stilson had been released or discharged from any liability upon his covenant of warranty, in the deed to Bartlett for the DeKalb county farm. But after a careful examination of all the testimony in the record, we are not convinced that the evidence is sufficient to overthrow the *prima facie* case made by the note and mortgage, and the decree of the circuit court is therefore reversed, and the complainant's bill dismissed without prejudice.

Decree reversed.

LELAND, J., having tried this case in the Circuit Court, took no part in this decision.

Augustine et al. v. Doud.

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GEORGE P. AUGUSTINE ET AL. Impl'd, etc.

v.

SAMUEL DOUD.

1. **PROOF OF SERVICE—CERTIFICATE OF CLERK.**—It was insisted that the decree in this case was erroneous, because the record did not show that summons was ever served upon one of the defendants. *Held*, that the record showed nothing in respect to the return of the writ. The certificate of the clerk in the record, that the summons was returned, never having been served, constituted no part of the record. The clerk can certify only to what he finds upon the records and files in his office. If any return had been made on the writ he might have copied it into the record, but this he has failed to do.

2. **FACT OF SERVICE FOUND BY THE DECREE—PRESUMPTION.**—The decree rendered in the case, finding that the defendant was duly served with process at least ten days before the commencement of the term, it will be presumed from such finding, that evidence of the fact was heard and the party properly in court.

3. **RE-SALE BY MASTER WITHOUT ORDER OF COURT—SALE NOT NECESSARILY VOID.**—Although it is not the correct practice for the Master to re-sell the property without an order of court, on the failure of the purchaser to comply with the terms of sale, still, if the master does re-sell upon his own responsibility, it would not necessarily be sufficient ground to hold the second sale void.

4. **DEFECTIVE NOTICE OF SALE.**—The decree required the Master to give notice by publication, three successive weeks, and by posting up written or printed notices in three public places. No notices were in fact posted, and publication was made for only two weeks. *Held*, that the Master derives his authority from the decree alone, and must pursue it substantially, or his acts will be set aside.

5. **DECREE FOR ATTORNEY'S FEES—NOT ALLOWED UNLESS CLAIMED IN THE BILL.**—No allowance for attorney's fees can be made in the decree, even upon a default, when no claim is made therefor in the bill, even though the mortgage contained a provision for payment of attorney's fees in case of foreclosure, etc. A default admits nothing except what is properly pleaded. A defendant may choose to suffer default rather than incur the expense of a defense, but a complainant cannot be permitted, after a default, to prove against a defendant a claim, which, if asserted in the pleading, he might have chosen to defend.

6. **DECREE IN VACATION—APPEAL AT SUBSEQUENT TERM.**—Where an appeal was prayed at the same term at which the decree purports to have been rendered, though in fact the decree was subsequently signed in vacation, and the prayer for appeal remained undisposed of until the November

Augustine et al. v. Doud.

term following, the Court had the power to make an order allowing the appeal at the latter term.

7. PARTIES IN FORECLOSURE—SUBSEQUENT MORTGAGEE SHOULD BE MADE.—Where the record disclosed that a certain person had an interest as assignee of a subsequent mortgagee, it was error to render a decree of foreclosure without making him a party to the proceedings.

APPEAL from the Circuit Court of Grundy county; the Hon. JOSIAH McROBERTS, Judge, presiding.

Mr. E. SANFORD, for appellants; that an allowance of attorney's fees cannot be made where the bill claims none, cited *Adams v. Payson*, 11 Ill. 26.

That a foreclosure cannot be had of a portion of the mortgaged premises and not of the other: 21 Maine, 126; 1 Hiliard on Mortgages, 327.

If an answer discloses an interest in a third party, he must be made defendant: *Herrington v. Hubbard*, 1 Scam. 569; *Prentice v. Kimball*, 19 Ill. 320.

A default admits only that which is properly alleged in the bill: *Cronan v. Frizell*, 42 Ill. 319.

If an improper decree was entered, it will be reversed, although objections were not interposed: *Strang v. Allen*, 44 Ill. 428.

A defendant defaulted may except, bring error and insist that the averments do not justify the decree: *Gault v. Hoagland*, 25 Ill. 266; *Moore v. Titman*, 33 Ill. 358.

Messrs. NEEDHAM & MILLER, for appellee; that no replication need be filed to an answer which was nothing but a disclaimer, cited *Spafford v. Manning*, 2d Ed. Ch. 350.

That the court had no power to vacate a decree entered at a former term: *Coursen v. Hixon*, 78 Ill. 339; *Nat. Ins. Co. v. Chamber of Commerce*, 69 Ill. 22.

That the appeal was not taken at the term at which it was rendered: Rev. Stat. § 67, "Practice Act;" *Vance v. Schuyler*, 4 Scam. 286; *Nat. Ins. Co. v. Chamber of Commerce*, 69 Ill. 22.

SIBLEY, P. J. In June, 1870, John Augustine and Oliver P. Augustine executed to Samuel and Leander L. Doud a

Augustine et al. v. Doud.

mortgage upon the East hf. of the N. E. qr. of Sec. 26, T. 32, N. R. 8, and the N. W. qr. of the S. E. qr. of Sec. 23, to secure the payment of \$3,590, evidenced by four promissory notes. At that time Oliver P. owned the 40-acre tract, and John Augustine the 80. That after the execution of the mortgage John Augustine died intestate, leaving four children or their descendants surviving him. That Geo. P. Augustine, who was one of the heirs of John, purchased of Oliver P., another heir, a fourth interest in John's estate, and also the entire title to the 40-acre tract described in the mortgage; assuming, at the time of the purchase, the payment of the mortgage debt.

Soon after the execution of the notes and mortgage, Leander L. Doud assigned his interest in them to the appellee. Samuel Doud in March, 1876, brought suit by bill in chancery to foreclose this mortgage for a balance due upon two of the notes it was given to secure. By the original and amended bills filed in the cause, George P., and the heirs of John Augustine, Jacob H. Little, and the trustees of the Congregational Church of Braceville were made parties defendant, on the ground of having some interest in the mortgaged premises. Jacob H. Little was the only one that answered, and he set up the defense that George P. Augustine had executed to him a subsequent mortgage upon the land, to secure the payment of a large sum of money, but that he had assigned the mortgage and notes accompanying it to one E. A. Otis, of Chicago, who was at the time of the filing of the bill in this case the owner and possessor of them. In March, 1876, a short rule was taken on Geo. P. Augustine to answer the complainant's bill. The order recited that it appeared to the court he had been duly served with process at least ten days before the first day of the term. Failing to comply with the rule, the bill was taken as confessed against him.

At the November term of the court, 1876, a default was entered against all of the other defendants, and a decree of sale rendered. At the March term, 1877, on motion of Geo. P. Augustine and Jacob H. Little, the sale made under that order and the decree were both set aside and vacated. During the term the bill as amended was taken for confessed against

Augustine et al. v. Doud.

all of the defendants except Jacob H. Little, and another decree of sale entered. A sale was made by the Master in Chancery under that decree, on the 9th of the succeeding June, to Wm. H. H. Augustine, who refused to comply with the terms of sale, and the Master re-advertised the property, and on July 7th, 1877, again sold the land to George Littlejohn. The Master reported his proceedings at the November term of the court, 1877, when the appellants excepted to his report of sale in July, and moved the court to set it aside, and vacate the decree by which it was ordered.

The exception and motion of appellants were overruled by the court, and an appeal allowed and taken to this court, where quite a number of errors have been assigned for reversing the decision of Circuit Court.

But we do not, however, think it necessary to notice many of the irregularities that seem to have crept into the record, and shall therefore confine the investigation to what relates to the merits of the controversy.

1st. It is argued by counsel that in rendering a personal decree against Geo. P. Augustine, the court committed an error, because it does not appear that the summons issued was ever served upon him. That the record shows one only was issued, which was returned March 15, 1876, "never having been served." There is a mistake of counsel, for the record shows nothing in respect to the return of the writ. There is copied into the record what appears to be a statement of the clerk, that "the summons was returned on the 15th of March, 1876, never having been served." But this constitutes no part of the record. The clerk can certify only to what he finds upon the files and records remaining in his office, and he does not intimate that there is any record of the fact that the Sheriff never served the summons on Geo. P. Augustine. How could he know what the sheriff had not done? If any return had been made on the writ, he might have copied it into the record. But this he has failed to do. Any doubt that might arise upon the question, seems to be removed by the decree rendered November, 1876, which finds that Geo. P. Augustine was duly served with process by the sheriff of the county at

Augustine et al. v. Doud.

least ten days before the commencement of the term. From which finding, it must be presumed that evidence of that fact was heard, and the party properly in court. Moreover, Augustine voluntarily appeared at the following March term, and on his and Little's motion, the decree of November, 1876, and the sale made by virtue of it, were set aside and vacated. He also appeared in court by his attorney, when the decree appealed from was rendered, as is shown by the decree, and other proceedings there had.

2d. Was it proper for the Master, after he had made the sale in June to one of the defendants in the case, and the purchaser having failed to comply with the terms of sale, to re-sell the property without an order of the court disposing of the first sale? This, doubtless, was not the correct practice. 2 Daniels' Ch. Pl. & Pr. 1,463 ; Hill v. Hill, 58 Ill. 239.

Still, if the Master does re-sell upon his own responsibility, it would not necessarily be sufficient grounds to hold the second sale void. 3 Edw. Ch. 298; Marshall v. Neafee, 1 Green. Ch. 409; Dells v. Joseph, 33 Ill. 262.

The decree in this case required the Master to give notice by publication *for the space* of three successive weeks in the Morris Herald, and by posting up written or printed notices thereof in three of the most public places in the county.

The sale, which was excepted to, took place on the 7th of July, 1877, and the printer's certificate proves that the first publication was made on the 22d day of June. Did this constitute the space of three successive weeks, or twenty-one days' notice? The notice given covered the space of two weeks only, instead of three, as required by the decree, and would therefore seem insufficient, as was indicated in Pearson v. Bradley, 48 Ill. 250. The language used in the decree rendered in Garrott v. Moss, 20 Id. 249, was quite different from the wording of this. But it further appears from the certificate of evidence that the Master failed entirely to post up the additional notices required by the decree, either written or printed.

The Master derives his authority from the decree alone, and must pursue it substantially, or his acts will be set aside. Jacobus v. Smith, 14 Ill. 359; Korne et al. v. Harper, 48 Id.

527. But as the decree ordering the sale was clearly erroneous, and must be reversed, the necessity of deciding whether the irregularities in respect to the sale were of that character to avoid it, is obviated.

There was no claim made in the bill for an allowance of attorney's fees, and it was therefore improper for the Court to assess \$150 for that purpose against Geo. P. Augustine, in addition to the amount due upon the mortgage. It may be doubtful whether the clause in the mortgage which provides for adding to the judgment in case of sale, costs, taxes, etc., and also "attorney's fees," is sufficiently explicit to admit of any recovery if it had been claimed in the bill. Not having been claimed in the bill it is quite plain that the complainant was entitled to no such allowance, even upon a default. It is nevertheless urged by appellee that Augustine, being in default, therefore Doud had a right to recover anything which the mortgage provided for, whether claimed in the bill or not.

The mortgage provided for adding to the judgment any sum paid for taxes. Will it be contended, that if the mortgagees had paid the taxes for any number of years upon the premises, that the various sums so paid could in assessing the damages, be added to the amount due upon the mortgage without some allegation in the bill notifying the defendant of the fact of such payment, and the claim to be reimbursed? It is a well established rule that a defendant upon a default admits nothing except what is properly alleged in the pleadings against him. If when he has seen by the bill what was claimed he chooses to submit to it rather than incur the expense of making a defense, can it be permitted to the complainant after a default to prove up against him a claim, which if asserted in the pleading, he might have chosen to defend? In *Adams v. Payson*, 11 Ill. 26, where a claim for attorney's fees was proven upon a default, although there was an agreement in the case that solicitor's fees should be taxed against the defendant if the complainant had to foreclose the mortgage, yet there being no allegation in the bill claiming that any services were due, the court said the "principle forbidding it is so familiar, that authority in its support would be superfluous. * * No

Augustine et al. v. Doud.

claim for that fee is set up in the bill and the defendant had no opportunity to defend that claim."

It has not escaped our observation that appellee denies the right of appeal from the decree in this case, rendered at the March term, because it was not allowed until the following November. The appeal, it should be borne in mind, was prayed at the March term when the decree purports to have been rendered. Though it is said and not denied, that the reason no action was taken upon the prayer arose from the fact that the decree was not rendered at that term, but was afterwards signed in vacation. If such was actually the case it would have been a good reason for setting it aside. For we are not aware of any authority in the Circuit Judge to sign a decree in vacation, unless where the case is taken under advisement, according to sec. 47-332 of the revised laws of 1874, or by consent of the parties to the suit, including those in default as well as all others. The position assumed that the court after a case has been decided may direct the attorney to draw up a decree, and that it can be signed in vacation by the judge, while those objecting to the decision cannot appeal at that term because there is no decree to appeal from, and that any appeal taken from the decree rendered in vacation at a subsequent term would be of no avail, is not only a singular but an anomalous one. The court, it is said, declared the ground of its decision; the defendants prayed an appeal, but the court refused to allow it because there was no decree to appeal from. A decree was prepared and signed by the judge in vacation when there was no power to grant the prayer except by consent; then if it was too late at the next term to allow it, the right of appeal was entirely lost. This would be a construction of the law calculated to abridge one of the most important rights secured to every suitor.

Inasmuch as the prayer for an appeal was entered at the March term, and remained undisposed of, the court had the power to make the order allowing it at the next term.

Little complains that the property was not decreed to be sold in the order it ought to have been with respect to his right as subsequent incumbrancer. It is quite evident that he

Augustine et al. v. Doud.

is not in a condition to ask the court for any decision upon the question. For his answer shows that he had previous to the commencement of the suit assigned the mortgage and notes which he held to E. A. Otis, who was then the owner and possessor of them, and that he had no interest in the proceeding. Hence he has not been injured, and has no right to complain. It is urged that he is liable as endorser of the notes, and therefore is interested to see how much can be obtained out of the premises toward the extinguishment of the mortgage debt. It is a sufficient reply to say that in his answer he sets up no such claim, but merely disclaims any interest in the controversy, suggesting to the court that E. A. Otis is the real person interested and should be made a party to the suit. In this we think that he was right. According to the most correct rule of practice the complainant should, on the coming in of Little's answer, have amended his bill and made Otis a party defendant.

That all persons having an interest in the subject matter should be made parties to the suit is a familiar principle. *Montgomery v. Brown et al.* 2 Gilm. 581; *Ellis v. Southwell*, 29 Ill. 552; *U. S. Savings Inst. v. Brockschmidt*, 72 Ill. 370; *Hart v. Wingart*, 83 Ill. 282.

Although there may be some conflict of authority upon the subject, we are disposed to follow the practice suggested in the cases cited, and hold that Otis was an "indispensable party," and the court erred in disposing of the case in his absence, when the record showed that he was a subsequent mortgagee, having such an interest in the mortgage premises as required him to be made a party to the proceedings of foreclosure upon the prior lien.

For the reasons given the decree of the Circuit Court will be reversed and the cause remanded, with leave to the complainant to amend his bill.

Decree reversed.

Wadleigh et al. v. Develling.

J. S. WADLEIGH ET AL.

v.

JOHN D. DEVELLING.

1. PROMISSORY NOTE GIVEN FOR THRESHING—DEFENSE, THAT TUMBLING-RODS WERE NOT BOXED.—A bare tumbling-rod to a threshing machine, unprotected in some manner, is dangerous *per se*, and dangerous by legislative enactment; and this fact constitutes a defense to an action on a promissory note given for threshing.

2. ATTEMPT TO SECURE TUMBLING-ROD—A QUESTION FOR THE JURY.—If there had been any attempt to secure the shafting by boxing, or any other substituted contrivance, it would then become a question of fact for the jury to determine whether the threshers had secured the shafting.

APPEAL from the Circuit Court of Kankakee county; the Hon. OWEN T. REEVES, Judge, presiding.

Mr. H. LORING, for appellants; that the statute requiring tumbling-rods of threshing-machines to be boxed, comes within the police power of the State, cited Cooley's Constitutional Limitations, Chap. 16; Thorpe v. Rutland, etc. R. R. Co. 27 Vt. 199.

Mr. WILLIAM POTTER, for appellee; as to the endorsement of the note, cited Edwards on Bills, *151; 2 Barb. 625; Martin v. Judd, 60 Ill. 78.

LELAND, J. There can hardly be said to be any conflict as to the facts in this case.

The appellants employed Joseph Delay and Henry Holmes, who were engaged in the business of threshing grain, to do some threshing with a machine. The work was done, and appellants gave their note, dated November 22, 1877, therefor, for two hundred and sixty-four dollars, payable one day after date to the threshers, by the names of Joseph Delay and H. Holmes. Develling, the appellee, testifies that he obtained the note on the day of its date; that Delay was owing him about fifty dollars, and left the note with him as collateral,

Wadleigh et al. v. Deyelling.

to collect and apply towards the payment of the debt. On the back of the note, at this time, the names of "Joseph Delay" and "Henry Holmes," appeared, written in pencil. It does not appear how the names were placed there. Holmes states that he does not know. His co-payee was not a witness, but whether Delay would have been dangerous to appellee, or whether his attendance could not be had, does not appear. Develling knows that the names were on, but does not know who wrote them. Holmes says that ten or twelve days after the maturity of the note, he wrote the names of "Joseph Delay," and his own name as "H. Holmes," in ink on the back. It does not appear whether the ink names were written over the pencil names, or at another place.

The declaration is evidently on the written names, and not on the pencil names. The allegation is that the payees endorsed by the names of Joseph Delay and H. Holmes, which is the way the names appear in ink, while the pencil names are in full, Joseph Delay and Henry Holmes. It is not alleged that Delay and Holmes were partners in business. There is no evidence that anything was done to protect the tumbling-rod, the knuckles, or the jacks; but it appeared that the knuckles were a kind patented by Robinson & Thorp, and that they were safer than some of an older date and style, according to the evidence of some witnesses, who said so against the objections of the appellant's counsel. Some experiments were also testified to against the objection of appellants, such as striking a coat against the shafting, putting a pair of overalls on the shafting to see whether they would wind round it, etc., putting a coat on it, which did not wind up, but the shaft threw it off, etc. If the clothing was put on for the purpose of not having it wind up, the experiment was successful; if for the purpose of having it wind up, it was a failure. Any man of ordinary sense could have produced either result, without much effort.

The jury were so instructed that they, undoubtedly, when we consider the usual disposition with which such a defense as the one set up in the special plea in this case is received, found for the plaintiff below on the question of the securing the tumbling-

Wadleigh et al. v. Develling.

rod. That is, rather than that the appellants should get rid of paying for the threshing, they probably concluded, under the instructions, that the tumbling-rod, knuckles and jacks were not quite unsafe enough to make the threshers lose the pay for their work, especially as the makers of the note had been well satisfied with everything else except paying it.

The jury may not have so much objected to the payment of a penalty for the violation of the law, as to the receipt of it by those who stood by, aided and abetted in this violation.

If the declaration had stated that Delay and Holmes were partners in business, and that Delay, before the maturity of the note had, instead of using the firm name, placed his own name and that of his partner Holmes on the note, and delivered it to the plaintiff before maturity, and there was no conflict in the evidence as to the time of the assignment, we might have affirmed the judgment; but as the declaration is not on the pencil assignment by Joseph Delay and Henry Holmes, but is on the ink assignment by Joseph Delay and H. Holmes, and as this was after maturity, that cannot be done.

It is not important to examine particularly all the different ways in which the question is raised. It all resolves itself into this: Has the legislature left it an open question to be investigated on each trial, whether there was any real danger? Or is it legislatively declared that tumbling-rods and knuckles are dangerous unless they are *secured* by the threshers by some protection, such as boxing, or by stakes and ropes, or some other contrivance to prevent the raiment of human beings from coming in contact with them. The court below instructed the jury that if they believed, from the evidence, that the tumbling-rod and knuckles were *secure*, though nothing was done in the way of boxing, or other substituted contrivance in lieu of boxing, they should find for the plaintiff. We think the bare tumbling-rod is not only dangerous *per se*, but that it is dangerous by legislative enactment, and that unless there be some protection by the threshers *to the rod and each length or section thereof, except the one next the horse-power*, the thresher cannot recover. The first section of the act is as follows: "That all persons in this State, who are, or who may hereafter, own or

Wadleigh et al. v. Develling.

run any threshing-machine, corn-sheller, or any other machine which is connected to horse-power by means of tumbling-rods or line of shafting, *shall cause each and every length or section of such tumbling-rod (except the one next the horse-power), together with the knuckles or joints and jacks thereof, to be safely boxed or secured while running.*"

The second section provides that if the first section be violated, *no action shall be maintained for services rendered by or with the machine.*

The general object of the law is salutary. Experience had shown that tumbling-rods were dangerous. Perhaps the danger is greater at the point of junction of different lengths or sections where the knuckle or joint is; but the rod is also dangerous at other places than at the knuckle. The Legislature has not said that the knuckles only shall be boxed, or otherwise *secured*, but that some box or other barrier shall be interposed between persons and the rods, all along the line of shafting, as well between knuckles as at the knuckles.

If there had been any attempt to interpose any obstacle between persons and the shafting by using stakes and ropes, or if any other substituted contrivance in lieu of boxing, had been resorted to, then we would be disposed to consider it a question of fact *whether the threshers had secured the shafting*, for the jury to pass upon. Where, however, it appears, without dispute, that absolutely nothing was done, that there were four lengths of tumbling-rod, elevated four or five feet only at the cylinder, descending gradually to the horse-power, a distance of eighteen or twenty feet left to revolve in utter legislative forbidden nakedness, without the slightest regard to the statute in such cases made and provided; we have no hesitation in saying that the statute has been violated. There was nothing for the jury to pass upon, and the note cannot be collected if assigned after maturity, and the jury should have been directed to find for the defendants if they found the note had been indorsed after maturity.

If the law be an unwise one, let it be repealed; but until it be repealed, let it be faithfully observed by judicial tribunals,

Ayers v. Hawks et al.

in its letter and in its spirit, whatever may be thought of the morality of a defense like the one in this case.

Reversed and remanded, with leave to plaintiff below to amend his declaration.

Reversed and remanded.

HENRY S. AYERS
v.
RACHEL E. HAWKS ET AL.

DEED OF MARRIED WOMAN—ACKNOWLEDGMENT—WAIVER OF HOMESTEAD.—Under the statute in force April, 1871, relating to the acknowledgment of deeds by married women, the homestead right of the wife must appear to have been expressly released by her in the body of the deed, as well as in the certificate of the officer taking the acknowledgment. And where in the body of the deed the release of the homestead right appears to be expressly limited to the husband, the wife will be held not to have relinquished her homestead right by joining in the execution of the deed, though it would be sufficient to release dower.

APPEAL from the Circuit Court of Lee county; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. W. E. IVES & SON, for appellant; argued that the homestead right was released by the wife, and cited *Patterson v. Kreig*, 29 Ill. 514; *Clubb et al. v. Wise*, 64 Ill. 157; *Richard et ux. v. Greene*, 73 Ill. 54; *Vanzant v. Vanzant*, 23 Ill. 536.

Mr. A. K. TRUSDELL, for appellees; in support of the judgment below, cited *Patterson v. Kreig*, 29 Ill. 514; *Kitchell v. Burgwin et al.* 21 Ill. 40; *Boyd v. Cudderback et al.* 31 Ill. 113; *Vanzant v. Vanzant*, 23 Ill. 536; *Hutchings v. Huggins*, 59 Ill. 33; *Richards et ux. v. Greene*, 73 Ill. 54.

LELAND J. This was a bill filed by Rachel Hawks, in her own right, and as the next friend of her husband, Benjamin R.

Ayers v. Hawks et al.

Hawks, to restrain appellant from selling the premises hereinafter described under a trust deed. There was a cross-bill by appellant against appellee, Rachael Hawks, and her husband, Benjamin R. Hawks, for the sale of the premises described, to pay the note secured, out of the proceeds, etc. There was a prayer for the appointment of a guardian for the husband, who had become insane since the execution of the deed. It was alleged in the cross-bill that the husband and wife had executed and acknowledged the trust deed so as to release the homestead. The court below decreed that she had not, that as her homestead could not be set off, the premises be sold, and one thousand dollars be paid to her, and the surplus be applied to payment of costs, and the debt due appellant.

The only question in the case is whether the wife has so executed and acknowledged the deed as to release the homestead right. Whether the wife as next friend of her husband, or in her own right, was entitled to the one thousand dollars, is a matter of no moment to appellant. The decree protects him. The deed is signed by both husband and wife, and is acknowledged by both of them in due form to release the homestead. As to the wife, the certificate of acknowledgment contains the following, "and expressly waived and released all right, claim, benefits, advantage and exemption under any and all homestead exemption laws so called."

That portion of the body of the deed which is on this subject, is as follows: "And the said Benjamin R. Hawks, party of the first part, hereby expressly *waives* and *releases* any and all right, benefit, privilege, advantage and exemption, under and by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution, or otherwise, and especially under the act entitled 'An act to exempt homesteads from execution,' passed by the General Assembly of the State of Illinois, A. D. 1851, and approved February 11th, 1851, and an act entitled 'An act to amend an act to exempt homesteads from sale on execution,' passed by said Assembly, A. D. 1857, and approved February 17th, A. D. 1857." Immediately following come the covenants of warranty, commencing: "And the said Benjamin R. Hawks, and

Ayers v. Hawks et al.

Rachel E. Hawks his wife, party of the first part, for themselves, their heirs, executors and administrators, *covenant*," etc., etc. The deed in the granting clause is as follows: "Now therefore, the said Benjamin R. Hawks and Rachel E. Hawks (his wife), party of the first part, *doth* grant, bargain, sell and convey unto Henry S. Ayres, lot one in block four, in Wymon's addition to Amboy, &c., together with all and singular the privileges and appurtenances thereunto belonging."

The court below held that the husband alone had complied with the statute as to releasing the homestead right.

We have no means of judging whether the name of the wife was intentionally or accidentally omitted from the body of the deed, nor whether she appears in the acknowledgment merely because the form was constructed for wives, and the blanks were filled by the officer, and that she did not notice particularly that part of the ceremony, or whether she understandingly and deliberately made the acknowledgment.

It would seem that her name was purposely omitted from the body of the deed, and it may be in anticipation of the fate which afterwards befell her husband, with the consequent separation, he now being at Elgin, hopelessly insane.

The use of the verbs *waives and releases* would indicate intentional exclusion of the wife, not accidental omission to fill a blank; and yet we find that they both "*doth* grant," and in the covenants the singular and plural verbs, nouns and pronouns are strangely commingled.

The statute in force at the time of the execution of the deed, which was April 4th, 1871, was as follows: "And no release or waiver of such exemption shall be valid, unless the same shall be in writing, subscribed by such householder, and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged," it being the object of this act to require, in all cases, the signature and acknowledgment of the wife as conditions to the alienation of the homestead.

This statute is too plain to require any judicial construction to show that the homestead right of the wife must appear to have been expressly released by her in the body of the deed, as

Nelson et al. v. McIntyre.

well as acknowledged to have been done in the certificate of the officer taking the acknowledgment. Such are the repeated decisions of our Supreme Court.

In the case of *Boyd v. Cudderback et al.* 31 Ill. 113, Judge Walker says that the amendatory act of 1857 was adopted to protect the wife against the acts of the husband, that no act of his, until she did what the statute has required, should deprive her and the family of a home.

No case exactly like the present is cited by counsel, nor have we discovered any, but if the release in the body of the deed be expressly limited to the husband alone, it would seem to be self-evident that the wife had not expressly released her homestead right in the deed, and acknowledged that she did so in the acknowledgment, and that these two things not concurring, she has not parted with her homestead right. The deed and acknowledgment are undoubtedly sufficient to release dower; and if the wife be excluded from the clause in the body of the deed as to releasing the homestead, then the execution was for the purpose of releasing dower; and under the maxim that "the expression of one is the exclusion of another," not for the purpose of releasing the homestead.

Decree affirmed.

MURRAY NELSON ET AL.

V.

ARTHUR C. MCINTYRE.

1. REPLEVIN—QUESTION AT ISSUE.—The question in replevin is whether the property in controversy belongs to the plaintiffs, and hence, in an action of replevin for grain in warehouses, levied upon as the property of the defendants, there is no objection to the defendants being permitted to prove that there was grain in both warehouses belonging to other parties.

2. WAREHOUSE RECEIPTS—TRANSFER OF TITLE BY.—Where the evidence showed that grain had been delivered from the warehouse, and the warehouse receipts surrendered to the warehousemen, an instruction to the effect that if the jury believe from the evidence that the warehouse receipts in evidence were not held by the plaintiffs at the time of the levy of the execution offered

Nelson et al. v. McIntyre.

in evidence, but had been surrendered to the warehousemen prior to that time, then the plaintiffs are not entitled to any of the property replevied by reason of their once having held such receipts, is erroneous. If the real reason of the surrender was the delivery to plaintiffs of the grain mentioned in them, then they were most certainly entitled to the delivered grain because they had once held the receipts and had surrendered them for grain delivered in exchange therefor.

APPEAL from the Circuit Court of LaSalle county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Mr. CHARLES BLANCHARD, for appellants; that warehouse receipts are negotiable, cited Rev. Stat. 1874, 820, §§ 104, 118, 119; Burton v. Curyea, 40 Ill. 326.

That such receipts vest in the holder the absolute title to the property mentioned therein: Chicago Dock Co. v. Foster, 48 Ill. 510; Cool et al. v. Phillips et al. 66 Ill. 217; Broadwell v. Howard, 77 Ill. 305; Cochran et al. v. Riffy et al. 6 Cent. Law Jour. 88.

Messrs. MAYO & WIDMER, for appellee; that the agreement in evidence was an executory contract, creating no lien, and passing no title to the property as against creditors whose rights accrued prior to appellant's possession, cited Hunt v. Bullock et al. 23 Ill. 320; Titus et al. v. Mabee et al. 25 Ill. 257.

That it was competent for defendant to prove there was grain in the warehouse belonging to third parties: Reynolds v. McCormick, 62 Ill. 412; Constantine v. Foster, 57 Ill. 36.

SIBLEY, P. J. James G. Wilson recovered judgment against Elias Richardson and William N. Richardson. McIntyre, as sheriff of LaSalle, levied an execution issued on this judgment, on grain in a warehouse at Ottawa, and in one at Streator; the officer received the execution on the 23d of Oct. 1875, made the levy on the 25th. Appellants brought replevin against appellee for the grain in both warehouses. On a trial in LaSalle county, there was a verdict and judgment thereon for defendant. Defendants in execution were engaged as partners in buying, storing and shipping grain at Ottawa and

Nelson et al. v. McIntyre.

Streator, under the firm name of E. Richardson & Son. Appellants were carrying on in Chicago a general commission and grain business; they made advances of money to Richardson & Son, and received from time to time consignments of grain, sold the same on commission, and remitted proceeds by accepting and paying drafts, etc. On the 22nd of June, 1875, Pickering, one of the appellants, went to Ottawa. Owing to losses sustained by Richardson & Son, they had become somewhat considerably indebted to appellants, and the latter as a matter of precaution, entered into an agreement in writing as follows, viz:

“Articles of agreement made and entered into the twenty-second day of June, A. D. 1875, between Elias Richardson and William N. Richardson, as the co-partnership firm of E. Richardson & Son, parties of the first part, and Murray Nelson, E. B. Stevens and A. H. Pickering as the co-partnership of Murray, Nelson & Co., parties of the second part, witnesseth, that whereas, the said party of the first part are now indebted unto the parties of the second part in the sum of twelve hundred and fifty dollars, for money advanced and paid to and for the use and benefit of the parties of the first part, and whereas, the parties of the first and second part are still dealing together, and the parties of the first part are buying grain, and shipping the same as grain dealers; and to enable them to do so, the parties of the second part propose to make further advances, and to provide for the security of the parties of the second part for the payment of the money now not only due for advances made as aforesaid, but for such as may prove to be due upon transactions now and hereafter pending, this agreement is made, and which is as follows:”

“That the parties of the first part agree to employ, as clerk and book-keeper, Barclay H. Dorland, so far as the business carried on in the city of Ottawa is concerned; and that the said Dorland shall receive all moneys to be paid in to said parties of the first part upon the schedule of amounts hereto attached as being money due them, as also all money paid as further advances by said parties of the second part, as above mentioned and contemplated, so far as the said Ottawa business

Nelson et al. v. McIntyre.

is concerned; and that he shall have the exclusive keeping of books of accounts of said firm, and to make all entries therein, and to furnish to said parties of the second part a statement of such business whenever called upon by them so to do. The parties of the first part agree to ship the grain purchased in their Ottawa business to the parties of the second part, to be by them sold on account of advances, and for the purpose of settling up and adjusting the indebtedness aforesaid; and the parties of the second part agree to continue to make such further advances as shall enable the said parties of the first part to carry on their said business so long as they shall faithfully comply with this agreement, or until the matters in the agreement shall be disposed of by the parties hereto. Nevertheless, all of the undertakings of the parties hereto are to cease and determine, at the option of the parties of the second part, on the first day of December next; and it is understood that the chattel mortgage of this date given by the parties of the first part to the parties of the second part, of certain goods and chattels belonging to said E. Richardson & Son, as the mortgage given by said Elias Richardson of even date hereof, to said parties of the second part, upon lots ten and twelve, of block eighty-one of State's addition to the town, now city of Ottawa, in the county of LaSalle, and State of Illinois, and out-lot four, in the county addition to out-lots in the city of Ottawa, constitute and form part of the transaction contemplated by this agreement, and the indebtedness named in said mortgages is the same in this contract named, and whatever indebtedness shall be found to be due the said parties of the second part, from the parties of the first part, on the first day of December next, shall be construed to be the sum secured by said mortgages, and it is understood that the parties of the the first part, shall not be required to pay the said Dorland for his wages any more than fifty dollars per month, and that the expenses of conducting said business may be paid out of the funds of the business, including the money represented in the accounts hereto attached, as being assigned to the parties of the second part; and besides, the parties of the first part have assigned a note executed by James Donagh, for

Nelson et al. v. McIntyre.

one hundred and fifty dollars, and payable to said parties of the first part, with ten per cent. interest, in one year from the date thereof, to wit: the 15th day of April, 1875. It is distinctly understood that the said Dorland is to have no voice in the management of the business of said parties of the first part than as has been mentioned in the preceding part of this agreement. It is understood that the securities given this day as above mentioned, and the indebtedness to be determined on the first day of December next, relate to, and all of the provisions of this agreement relate to the said Ottawa business exclusively. And when the indebtedness named and contemplated in this agreement shall be fully paid, all securities and collaterals shall be returned and re-assigned, or otherwise adjusted as may be necessary.

Witness the hands and seals of the parties the day and year first above written.

ELIAS RICHARDSON. [Seal.]
WM. N. RICHARDSON. [Seal.]
MURRAY NELSON. [Seal.]
E. B. STEVENS. [Seal.]
A. H. PICKERING. [Seal.]”

Dorland, in pursuance of said contract, went to Ottawa and entered upon his duties under it, and acted as clerk and book-keeper for Richardson & Son, and as observer of passing events for Murray, Nelson & Co., for about four months. The business was carried on in the name of Richardson & Son, after the agreement of June 22d, 1875, in the same way as before; checks were drawn and receipts given to farmers in the name of E. Richardson & Son. Dorland, in his evidence, first said that the drafts on Murray, Nelson & Co. were signed “E. Richardson & Son, per Dorland.” He afterwards corrected himself, and said he signed some checks in this way. As to the outside world, the business of E. Richardson & Son in the warehouse at Ottawa continued the same while Dorland acted as clerk and observer under the contract as before.

There was no exception taken to the action of the jury in the reasons filed in favor of the motion for a new trial; nor is it assigned for error that the verdict was not sustained by the

Nelson et al. v. McIntyre.

evidence. Errors of the court only are complained of. In relation to the grain in the warehouse at Ottawa, the following points are made:

It is claimed that the fourth instruction asked by appellants should have been given because there was some evidence by Ruger, the deputy sheriff, that Dorland, as the agent of appellants, had taken possession of the grain in the Ottawa warehouse for appellants. We have examined Ruger's evidence carefully, and we find nothing in it except that he had an impression of that kind from something he had heard, but had no knowledge on the subject. Dorland, in his evidence, makes no such claim, and there is really no such evidence in the record.

It is not seriously contended by appellants in this Court that the grain actually in possession of Richardson & Son was not liable to be taken on execution against them, merely because of their relations with appellants under the agreement in writing of June 22d, 1875, though appellants may have deemed and called it their grain. And it seems to us that *that* is one of those questions which is too plain for discussion in this State.

The fourth instruction is not based upon evidence of any other possession, or transfer of possession, than that which results from the written agreement itself; but if it were so claimed, we think it was properly refused, because there was really no evidence tending to show delivery by Richardson & Son, and actual possession by appellants.

The foregoing answers the exceptions taken to defendant's first given instruction, also to the third. In the third the expression "while it remained in the possession of the Richardsons," would have been objectionable if there were a conflict of evidence as an assumption. The expression then should have been "if the jury believe from the evidence" in lieu of the word "while."

The excluded evidence of Ravens, that checks drawn upon the Exchange Bank, were signed E. Richardson & Son, by Dorland, and that the latter told witness not to honor any unless thus signed, seems to us entirely immaterial.

Dorland was there for appellants, merely as an observer of the way business was done with the money furnished by appellants, because of the relations of debtor and creditor existing between the parties to the agreement, and for the protection of appellants in that relation, as a sort of monitor and watcher of the funds.

We perceive no objection to the defendant below being permitted to prove that there was grain in both warehouses belonging to other parties. The question in replevin is whether the property in controversy belongs to the plaintiffs, and if it belongs to somebody else it does not to plaintiffs.

It is not generally considered improper to ask the question, "who was the owner of the property?" though the answer may be a conclusion of fact. Pickering however, though the court sustained an objection by defendant to the question, stated fully all the facts which created such conclusions. Though the objection was sustained, the question was really fully answered, and therefore no harm was done. As far as the Ottawa grain is concerned, we perceive no erroneous ruling.

As to the Streator grain, there was a conflict of evidence as to whether it was or was not actually delivered to appellants before the execution went into the hands of the officer.

Pickering testifies positively that the grain in the warehouse at Streator was, before this, the property of appellants, and he states his means of knowledge thus:

There had been introduced in evidence a number of warehouse receipts, given by Richardson & Son to appellants, for grain in store at Streator.

In relation to those receipts and the grain therein mentioned, this witness said: I went to Streator, taking the receipts with me, and called upon William N. Richardson. I told Richardson I had been sent there to have what grain we held receipts for shipped. He said he was ready to ship any time he got cars. We figured up the amount of grain in the warehouse. I gave him the receipts. He said he would ship the grain right out. We went and got what cars we could and loaded two of them. The grain called for by the receipts and in the warehouse was about even. I surrendered the receipts to him

Nelson et al. v. McIntyre.

myself after we estimated the quantity of grain in the warehouse. This was between the 20th and 24th of October. I think the 20th. I was there Thursday, Friday and Saturday. I telegraphed to Chicago for more cars. I think we got four more cars, and all were filled while I was there, with oats, corn and a little seed. The sheriff closed the warehouse before the grain was all out. The loaded cars had been billed and consigned to Murray Nelson & Co., and taken from the side track by the railroad company. The receipts he had called for more grain than there was in the warehouse. The result was, we figured up that he had so much grain on hand, then we figured up the receipts, and the receipts called for more grain than there was in the warehouse. The only examination we made was for the purpose of ascertaining whether there was enough grain in the warehouse to fill certain receipts which had not been filled. I went over the warehouse and looked at the grain. I took Mr. Richardson's book and figures for the amount of the grain. I did not estimate it.

With the foregoing evidence in the case, the Court at the request of the defendant, gave the following instruction to the jury: "If the jury believe from the evidence, that the warehouse receipts in evidence were not held by the plaintiff at the time of the levy of the execution offered in evidence, but had been surrendered to the Richardsons prior to that time, then the plaintiffs are not entitled to any of the property replevied by reason of their having once held such receipts." This instruction, when applied to the evidence tending to show that the receipts were surrendered because of the delivery of the grain in the warehouse mentioned in them, is clearly erroneous. If this was the real reason for the surrender, then the appellants were most certainly entitled to the delivered grain for the very reason that they had once held the receipts, and that they had surrendered them for the grain thus delivered in exchange for them. It may be said that the jury were properly instructed on this subject in appellant's sixth instruction. We think this sixth instruction was right, but appellee's 8th comes in direct conflict with it. Which shall the jury take? Would they not, if there be such conflict between two given

Nelson et al. v. McIntyre.

instructions, consider the one last given as to be preferred because it expressed the latest intention of the law-giver, and as repealing or annulling the prior one.

It may be that the result would have been the same if defendant had not asked, nor the court given the defendant's eighth, but we cannot so say. If the instruction was wrong, and might have done harm, we must reverse for the giving of it.

Defendant's fourth instruction is a little marred in the abstracting, but it is correct in the record.

As it is, in the record, we do not think it liable to appellant's criticism. Appellee's sixth instruction is inaccurate. It is as follows :

"6. The jury are instructed, that, under the receipts offered in evidence, the plaintiffs cannot recover any other grain than that specified in and actually represented by the receipts at the time they were severally issued. If the jury believe, from the evidence, that the Richardsons were, at the time said receipts were issued, engaged in the business of buying and shipping grain, through an elevator, or warehouse, at Streator, and continued in such after said receipts were issued, and in the course of such business, the grain represented by said receipts at the time they were issued, was shipped from the elevator, and other grain taken in; and that the business was so carried on with the knowledge, and without objection on the part of the plaintiffs, then the plaintiffs are not, by virtue of said receipts, as against the defendant, entitled to recover any grain replevied in this case, which was taken into said Streator warehouse since the issuing of said receipts."

When the relations are such as existed between appellants and Richardson & Son, we perceive no objection to the sale by the latter to the former of grain in store, by giving a warehouse receipt like those introduced in evidence as a *quasi* bill of sale, if the amount does not exceed that of their own grain in the warehouse, and if part of the receipts are surrendered and grain to the amount mentioned in them is shipped to appellants, and the receipts remaining represent the quantity not shipped, though not actually the last issued. We think the

O. O. & F. R. V. R. R. Co. v. Hall.

delivery of the remaining grain in exchange for the remaining receipts, would pass the title to such remaining grain to appellants as against the execution, if actually delivered before the execution went into the hands of the officer.

There may be errors in relation to the exclusion and admission of evidence, which we have not mentioned.

For the errors aforesaid, we think another jury should pass upon the case, and therefore the judgment is reversed and the cause remanded.

Reversed and remanded.

THE OTTAWA, OSWEGO & FOX RIVER VALLEY R. R. Co.

v.

LEVI N. HALL.

1. **CONDITIONAL SUBSCRIPTION—DELIVERY IN ESCROW—NON-COMPLIANCE WITH CONDITIONS.**—Appellee subscribed to the capital stock of appellant, and delivered such subscription to a director of the company, in *escrow*, not to be delivered to the company except on condition that the county of Kendall failed to vote a subscription to the company. *Held*, in the absence of proof, that Kendall county had failed to vote a subscription to the company, there was no delivery to the company, and no recovery could be had against appellee.

2. **COUNTY SUBSCRIPTION ILLEGAL—EFFECT UPON APPELLEE'S RIGHTS.**—The fact that the subscription voted by Kendall county was afterwards declared void by the courts, does not constitute such a failure as was contemplated in the conditional delivery of appellee's agreement. The fact remains that such subscription was voted by the county, and this was sufficient to relieve appellee from liability under the conditions of his subscription. He did not contract upon the basis of the final validity of the county subscription.

3. **DELIVERY TO A DIRECTOR NOT A DELIVERY TO THE COMPANY.**—If the person who received appellee's subscription did so upon condition that no delivery should be made to the corporation until the performance of certain conditions by the corporation, although he was a director therein, the corporation could acquire no right to the agreement until performance of the conditions under which it was delivered, no matter how it got possession thereof, unless there was a second delivery by consent of appellee.

4. **DECLARATIONS RESPECTING CONTEMPORANEOUS SUBSCRIPTIONS.**—It was not error to admit evidence of declarations made by the plaintiff

O. O. & F. R. V. R. R. Co. v. Hall.

relating to other subscriptions without specifically designating to which one reference was made, it appearing that the subscriptions to which the declarations referred were all contained in the same book with that made by appellee were made at the same time, and sufficiently identical with that of appellee to be considered as a class of instruments and spoken of in general terms, especially when the party in interest had treated them all as of the same character, without any intimation that the one in suit varied from the others.

5. PAROL PROOF OF DELIVERY UPON CONDITIONS.—It is competent to show by parol that a written agreement was delivered, to take effect only upon certain conditions. Such proof is not admitted for the purpose of changing the terms of the written contract, but for the object of determining whether in fact it ever had an existence at all as a contract

APPEAL from the Circuit Court of LaSalle county; the Hon. EDWIN S. LELAND, Judge, presiding.

Mr. E. N. LEWIS and Mr. H. T. GILBERT, for appellant; that the vote of Kendall county, authorizing a subscription to the corporation was invalid, cited *Ryan v. Lynch*, 68 Ill. 160; *Miller v. Goodwin*, 70 Ill. 659; *Supervisors of Kendall county v. Post*, 4 Otto, 260.

Delivery of the note to a director was a delivery to the corporation, and delivery as an *escrow* cannot be made to the payee: *Braman v. Bingham*, 26 N.Y. 490; *Skinner v. Baker*, 79 Ill. 496; *Stone v. Duval*, 77 Ill. 475; *Neeley v. Lewis*, 5 Gilm. 31.

A deed or other instrument cannot be delivered as an *escrow* to an agent or officer of the grantee, when the grantee is a corporation: *Price v. P. Ft. W. & C. R. R. Co.* 34 Ill. 13; *Wight v. Shelby R. R. Co.* 16 B. Mon. 5; *Vicksburg, etc. R. R. Co. v. McKean*, 12 La. An. 638; *Thompson v. Candor*, 60 Ill. 244; *Moss v. Riddle*, 5 Cranch, 351; *Foy v. Blackstone*, 31 Ill. 538; *Truman v. McCollum*, 20 Wis. 369; *M. & T. P. Co. v. Stevens*, 10 Ind. 1.

That parol proof of conditions under which delivery was made is not competent: *State v. Perry, Wright*, 662; *Foy v. Blackstone*, 31 Ill. 548; *Hays v. O. O. & F. R. V. R. R. Co.* 61 Ill. 422; *Corwith v. Culver*, 69 Ill. 502.

Against the admission of testimony relative to conditions in other subscriptions: *Walker v. Crawford*, 56 Ill. 444; *Gage v. Lewis*, 68 Ill. 604; *Best on Ev.* § 255.

O. O. & F. R. V. R. R. Co. v. Hall.

Mr. CHARLES WHEATON, for appellee; that it is a question of intention whether or not a deed was delivered to the grantee to operate as a deed *in præsenti*, cited Braman v. Bingham, 26 N. Y. 492; Bowker v. Burdekin, 11 M. & W. 127; Fairbanks v. Metcalf, 8 Mass. 230; O'Kelly v. O'Nelly, 8 Met. 437; Thompson v. Candor, 60 Ill. 244; Brown v. Reynolds, 5 Sneed, 639; Hastings v. Vaughn, 5 Cal. 315.

A deed may be delivered to the agent of the grantee, for a special purpose, and the delivery not be an absolute one: Gilbert v. North Am. Ins. Co. 23 Wend. 45; 3 Washburn on Real Prop. 272; Southern Life Ins. Co. v. Cole, 4 Fla. 369; C. W. & L. R. R. Co. v. Iliff, 13 Ohio St. 235; Worrall v. Munn. 1 Selden, 229; Bibb v. Reid, 3 Ala. 88.

Delivery to be valid, must be with the consent of the grantor: 3 Washburn Real Prop. 272; Rhodes v. School Dist. 30 Me. 110.

Delivery of a deed before the happening of the condition, is no delivery: Stanley v. Valentine et al. 79 Ill. 544; Ill. Cent. R. R. Co. v. McCollough, 59 Ill. 166; Shirley v. Ayers, 14 Ohio, 308.

SIBLEY, P. J. This action was commenced by the O. O. & F. R. V. R. R. Co., for the use of Joseph Jackson against Levi N. Hall, upon the following instrument in writing:

"\$200.

Oswego, January 20th, 1868.

"For value received, I, L. N. Hall, of the town of Oswego, county of Kendall, State of Illinois, promise to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, two hundred dollars, payable when the iron for said company's railroad is laid from Wenona, in the county of Marshall, in said State, to Oswego, Kendall Co., Ill., as follows: Twenty-five per cent. of said sum when the iron is so as aforesaid laid, and twenty-five per cent. every three months thereafter, until paid, with interest from and after the time the iron is laid as aforesaid, at the rate of ten per cent. per annum; provided, that if default be made in any payment as the same becomes due, the whole sum subscribed shall thereupon become immediately due and payable; or all payable when the iron is laid as aforesaid, at my option."

O. O. & F. R. V. R. R. Co. v. Hall.

“When said sum of money is fully paid, the said Ottawa, Oswego & Fox River Valley Railroad Company hereby agree to deliver to the subscriber hereto, a certificate for a like amount of its capital stock, on demand.

“L. N. HALL.

“W. BUSHNELL, Pres.

“D. F. CAMERON, Sec’y.”

The defendant denied the execution and delivery of the agreement, and that issue, on being submitted to a jury, was found in his favor.

The plaintiff from that finding and judgment appealed to this Court, and is here seeking a reversal on several grounds, which may be reduced to two or three. First in admitting on the part of the defendant what the plaintiff Jackson had said respecting the subscriptions obtained at Oswego made by other persons than the defendant.

It appeared that the appellee, Hall, who resided at that place, as well as many other citizens subscribed to the construction of the Railroad in a book used for that purpose. The terms of the subscription by these other parties were the same as that of Hall, and although the witnesses when testifying to what Jackson said in relation to those subscriptions, were unable to speak of the identical one in question distinct from the others, therefore it is urged, their testimony was erroneously admitted.

The Court, however, is of opinion that the subscription of Hall contained in the same book with the others, made at that place upon like conditions, was sufficiently identical with that of Hall to be considered as a class of instruments, and spoken of in general terms by witnesses without being specifically confined to the one in dispute. Especially when the party in interest had, himself, treated them all as of the same character without any intimation that the one in suit varied in the least from the others alluded to by the witnesses. That the testimony of witnesses should be restricted to the precise instrument in controversy, is not to be disputed. But when that instrument is intermingled with others of the same import, no injury could be sustained by the opposite party in allowing

O. O. & F. R. V. R. R. Co. v. Hall.

witnesses to testify respecting them as a whole without being able to single out the particular one in question, since the same result must be produced in either case.

The principal question in the case was whether when Hall executed the subscription paper, he delivered it to an agent of the corporation to hold as an escrow only, and be passed over to his principal upon certain conditions said to be imposed, or whether a delivery to the director of the corporation was equivalent to a delivery to the company itself. The weight of the evidence was clearly in favor of the position that Judson procured the subscription from Hall (although Jackson, the person for whose use the suit was brought, swears to the contrary), and that the contract of subscription was placed in Judson's hands, not to be delivered to the corporation except on condition that the county of Kendall failed to vote a subscription to the enterprise of \$50,000, is equally well established by the evidence.

The question then recurs whether the subscription paper was delivered to Judson, and if so, whether that amounted to a delivery to the corporation.

Counsel have expended much learning upon this question, and there appears to be some conflict in the authorities on the question. After a careful consideration of the cases, without a lengthened review of them, we have arrived at the conclusion, that Judson, who from the evidence, appears to have taken and held the subscription paper, did not occupy such a position in the company's service as to prevent him from holding the contract of subscription as an escrow.

It should be observed that the cases deciding the delivery to an agent is in effect a delivery to the principal, are instances where the agent was authorized to transact the business for his principal. In this case, the proof is that Judson was a mere volunteer, having no authority from the company to receive subscriptions for the grading of the road.

Then, if under such a condition of things he could not hold the contract as an escrow, no other officer of the corporation could do so, even down to a common station agent.

In *Price v. P. Ft. W. & C. R. R. Co.* 34 Ill. 36, referred to

by appellant, the deed was delivered to the solicitor of the company, whose duty related to that branch of its business. But in that case, the condition upon which the deed was delivered had been complied with, and the real question decided was whether the deed took effect from the time of the first or second delivery. So in *Wright v. Shelby R. R. Co.* 16 B. Monroe 5, the strongest case for appellant referred to, where it was held a delivery to the agent amounted to a delivery to the corporation, the person who received the deed was appointed for the especial purpose of transacting that identical business for the benefit of the company.

But we should hesitate, even if called upon, to push the doctrine of constructive delivery to the grantee in a deed to the extent stated in the opinion delivered in that case.

This subject of the effect of a delivery in escrow, is, in many instances, governed by the intention of the grantor at the time of delivery, and here it is proper to remark that the question asked and the answer allowed, put to the witness Hall as to what his intention was when he delivered the agreement to Judson as the depository, could not have produced any injury to the plaintiff. For the substance of his answer was simply that he intended to do just what the facts stated amounted to. Such was the only inference to be drawn from all the circumstances related by him, if he had not been permitted to answer the question.

Now what was actually done, and what was Hall's intention to do with the subscription paper? He says that he placed it in the hands of Judson to be held by him, and not to be delivered to the railroad company at all if the county of Kendall voted a subscription of \$50,000 to aid in the construction of the road.

His testimony in that respect was more than corroborated by that of Judson, who (unlike Jackson, that contradicts them,) appears to be perfectly disinterested in the case. For Judson states that if the county voted a subscription of \$50,000, or in case enough was procured otherwise to grade and tie the road, then the paper should be returned to Hall. If these were the conditions upon which Judson held the agreement, the corporation could

O. O. & F. R. V. R. R. Co. v. Hall.

acquire no right to it until they had all been complied with—no matter how the company got possession of the contract—unless there had been a second delivery by consent of Hall (of which there is no pretense). What was the proof that the conditions attached to the delivery of the contract had been complied with, so as to vest the company with the right to bring suit upon it?

We look in vain through the record to find any such proof, except, perhaps, the fact that although the vote of the people of Kendall county took place as contemplated in favor of a subscription of \$50,000, the law under which the proceedings were had was afterwards by the courts declared unconstitutional.

Therefore it is reasoned that there never was any valid subscription by the county of Kendall. It may not be impertinent to inquire what authority the parties have for interpolating into the contract the word *valid*.

Had not the person who executed the contract a right to attach such conditions to the delivery of it as he saw fit? and one of the conditions, as we have seen, was that if the vote to be taken in Kendall county was carried for the subscription, then Judson was to return the contract to Hall. No intimation that he was to wait to see if all the preliminaries of an election had been complied with, or the sale of the bonds negotiated, and the validity of the law under which they were issued tested. Such was not the contract of the parties, as stated by the witnesses; and are courts of law empowered to make one for them upon the equitable principle that the party executing it might, as a tax-payer, be relieved from aiding in the payment of these bonds, issued upon that invalid subscription?

Besides, from the evidence agreed upon contained in the cases mentioned as testimony, it appears that the Railroad Co. procured the bonds upon this subscription, and have sold and got the proceeds of them. Does it now lie in its mouth, to turn around and say the vote was a nullity, and no subscription was ever made by the county?

Then, again, if Judson tells the truth (and we do not feel disposed to say the jury had no right to believe him), the understanding between him and Hall at the time of the delivery

of the contract was, that even if the county of Kendall failed to vote the subscription of \$50,000, provided enough was raised from other towns by subscriptions to grade and tie the road, then his contract was to be surrendered to him. Judson also testifies that many thousand dollars more than enough was procured for that purpose. If the contract was to be returned to Hall upon the happening of this last event, was not the evidence sufficient to authorize the jury to find it had transpired?

Moreover, the law is stated in 3 Wash. on Real Prop. 270, to be that "when a deed has been delivered as an escrow, it has no effect as a deed until the condition has been performed, and no estate passes until the second delivery," and quite a number of authorities are referred to sustaining the doctrine of the text.

This rule may be subject to the exception where the intention of the grantor clearly appears to the contrary. There was, in this case, not only no second delivery, and no intimation to dispense with it, but according to the testimony of Judson (and we discover nothing in the record subjecting him to the imputation made by counsel), the corporation fraudulently obtained the possession of the contract which he held as the depositary.

Then, if the jury credited his testimony, what right had the company to recover upon a subscription thus obtained?

It is urged with some degree of earnestness that by this parol testimony, contrary to law, the terms of the written agreement were materially changed. A sufficient answer to that is, the verbal evidence was not admitted for the purpose of changing the terms of the written contract, but for the object of determining whether the contract had ever been delivered to the promisee, or whether it had any existence at all as a contract. If it had been delivered, no parol testimony before, or contemporaneous to its execution upon the subject, could have been admitted.

But that oral evidence is not admissible to show the condition upon which an instrument in writing is held in escrow, is

 Smith v. Kinkaid.

a position unsustained by any respectable authority. Perceiving no substantial error in the case, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

LELAND, J., having tried this cause in the Circuit Court, took no part in the decision.

 JOEL N. SMITH, use, etc.

v.

JAMES J. KINKAID.

1	620
78	474

1	620
115	2570

1. LEASE FOR A YEAR—TO COMMENCE IN FUTURO—LESSEE LIABLE FOR USE AND OCCUPATION.—Under a contract for renting for a year, to commence *in futuro*, where the lessee actually takes possession of the premises and occupies them, he will be liable for the use and occupation, though the contract as an executory one, may be void under the Statute of Frauds.

2. REPAIRS BY TENANT.—Unless there was an express agreement on the part of the landlord to repair, the tenant must take the premises as he finds them, and he cannot recover for repairs made by him, or damages sustained by reason of a want of repairs.

3. APPORTIONING COSTS—DISCRETION OF COURT NOT REVIEWABLE.—The apportionment of costs, on appeal from a justice, is the exercise of a discretion not reviewable on error.

4. COSTS ALLOWED FOR WITNESSES NOT EXAMINED.—It does not necessarily follow that witness fees should not be allowed because the offered evidence was excluded, nor because the witness was not examined. A witness may properly be summoned to meet some anticipated evidence, which is not offered because the witness is present, when it would be if he were absent.

5. WITHDRAWING EVIDENCE FROM THE JURY.—Although admitting improper evidence and afterwards excluding it, would not alone be sufficient ground for a reversal, if it could be seen that such admission did no harm, yet where it is plainly apparent that the admitted evidence constituted the only basis on which a verdict was found for the appellee, the exclusion of such improperly admitted evidence was in effect a mere theory of no practical benefit to the appellant, and the case should be reversed.

APPEAL from the Circuit Court of Grundy county; the Hon. H. McROBERTS, Judge, presiding.

Smith v. Kinkaid.

Mr. JAMES N. READING, for appellant; that instructions must be based on the evidence, cited *Riley v. Dickens*, 19 Ill. 28; *G. & C. U. R. R. Co. v. Jacobs*, 20 Ill. 478; *Hesing v. McCloskey*, 37 Ill. 341.

Where substantial justice has not been done, a new trial will be granted: *Higgins v. Lee*, 16 Ill. 495.

A parol contract is not within the statute of frauds if either party has it in his power to compel performance within a year: *McPherson v. Cox*, 96 U. S.; *Walker v. Johnson*, U. S. Sup. Ct. Oct. T. 1877.

As to the effect of the admission and subsequent withdrawal of improper evidence, and the duty of the Court in that respect: *Deerfield v. Northwood*, 10 N. H. 269; *Penfield v. Carpenter*, 13 John. 350; *Erben v. Lorillard*, 19 N. Y. 299; *Hood v. Hood*, 25 Penn. 42; *Delaware, etc. v. Barnes*, 31 Penn. 196; *Shaeffer v. Krietzner*, 6 Binn. 430; *Nash v. Gilkeson*, 5 S. & R. 352; *Ingram v. Crary*, 1 Penn. & W. 389; *Uangst v. Karaemer*, 8 W. & S. 391.

Mr. S. P. AVERY and Messrs. NEEDHAM & MILLER, for appellee; that the letting was for a year to commence *in futuro* and within the statute of frauds, cited Rev. Stat. 540; *Wheeler v. Frankenthal*, 78 Ill. 124; *Abt v. Lahmas*, 19 Ill. 576; *Comstock v. Ward*, 22 Ill. 248; *Ballingall v. Bradley*, 16 Ill. 373.

Where there has been no day fixed for the tenancy to begin, it will commence with the tenant's entry: *Taylor's Land. and Ten. § 68*; *Jackson v. Bond*, 4 Johns. 230; *Kemp v. Derrett*, 3 Camp. 510; *Church v. Gilman*, 15 Wend. 656.

That a verdict will not be set aside when the evidence is contradictory, unless it is clearly unsupported by the evidence: *Miller v. Balthasser*, 78 Ill. 202; *Jaeger v. Dieden*, 73 Ill. 612; *Wood v. Hildreth*, 73 Ill. 525; *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213; *City of Peru v. French*, 55 Ill. 317; *Lawrence v. Hageman*, 56 Ill. 68; *Kuhnen v. Blitz*, 56 Ill. 171; *Ill. Cent. R. R. Co. v. Frith*, 60 Ill. 451; *Young v. Schorling*, 60 Ill. 148; *Walker v. Martin*, 59 Ill. 348.

LELAND, J. This was a suit commenced before a justice of the peace of Grundy county, for an amount claimed to be due

Smith v. Kinkaid.

from appellee to appellant for rent of part of the Ross House in Morris, used for a classical school. The appellee claimed a set-off, and also that the contract for the renting was void under that portion of the statute of frauds, which provides that no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof. Appellee claimed that the contract was made prior to the first of October, A. D. 1875, for a year, ending October first, 1876, at two hundred dollars per annum. The appellant claimed that the contract was made July twenty-seventh, and that rent was to commence at that date; that it was rented for a school year at two hundred dollars, payable fifty dollars fifteen days after the beginning of each of four school terms, but that the tenancy was to end at any time when appellant should make a sale. There was a sale made by appellant on April 19th, 1876. Appellant claims that there were fifty dollars due November 23d and January 19th, and a like sum to be due April 27th thereafter. Both sides agree that appellee was not liable for rent after the sale. Appellant claimed that there was an adjusted balance due him of fifty-three dollars and forty cents, and appellee claimed that there was nothing due after the deductions of the claimed payments and set-off. Appellee claims that eighteen intelligent persons, six before the justice of the peace, and twelve in the Circuit Court have decided in favor of appellee, and this appears to be true. Appellant says the last named intelligent twelve were misdirected by the court, which also, we fear, seems to be true.

The question of the weight, and preponderance of the evidence is quite ably and elaborately discussed by counsel, but without careful examination as to whether the jury may have arrived at a correct result, we will examine whether there are erroneous rulings of the court as to the instructions, or as to the admitting or excluding of evidence.

As the pleadings in this case were oral, the case is to be considered as though the declaration was not only with a special count on an executed contract, which, when made, was invalid under the Statute of Frauds, but as though it was an action for use and occupation.

Smith v. Kinkaid.

We understand the law to be settled that under a contract for renting for a year, to commence *in futuro*, where the lessee actually takes possession of the premises, and occupies them, the occupant is liable for the use and occupation, though the contract, as an executory one, may be void under the statute. It seems hardly necessary to cite authority in support of this, but see Warner v. Hale, 65 Ill. 395; The Williams Butcher Steel Works v. Frederick M. Atkinson, 68 Ill. 421; John S. Wheeler v. Frankenthall & Bro. 78 Ill. 124.

If such be the law, then the eighth instruction given for the defendant is erroneous. It is as follows:

“The jury are instructed, that, if they believe, from the evidence, that the said Sanford, as the agent for Joel H. Smith, leased a part of the Ross House, to the defendant for the period of one year, from the first day of October, 1875, and that said lease was not in writing, and was made in the month of September, 1875, then, and in that case, the jury are instructed that said agreement was void, as being within the Statute of Frauds, *and the jury will find for the defendant.*”

There is no conflict about the appellee having used and occupied the premises; he himself, says he did from October 1st, 1875, until April 19th, 1876. Appellant claims that rent was to commence July 27th, 1875, but both agree upon the time when the relation of landlord and tenant ended as April 19th, 1876, and there was evidence tending to show that after the use and occupation had ended, there was a balance of fifty-three dollars and forty cents struck, and that appellee agreed to pay it on several occasions.

The giving the eighth instruction was probably an oversight, which must sometimes occur in the hurry of a jury trial.

There were instructions given for the defendant like the above, except that the conclusion stated was that the plaintiff could not recover *on the contract*. It is not necessary to inquire whether this, though correct, as an abstract proposition as to an unexecuted contract, was not inapplicable and calculated, when applied to the facts in this case, to mislead the jury, because the eighth is so clearly not the law, upon the facts in

Smith v. Kinkaid.

evidence, that we deem the error alone of giving that instruction one requiring a reversal.

The apportioning costs, on an appeal from a justice, is the exercise of a discretion not reviewable on error *Wickersham v. Hurd*, 72 Ill. 464. Whether limiting the number of witnesses, under section 15, page 299, Rev. Stat. of 1874, is or not, it is not necessary to determine. We are unable to say that the discretion was not properly exercised. It does not necessarily follow that witness fees should not be allowed, because the offered evidence of the witness is excluded, nor because he is not examined. A witness may properly be summoned to meet some anticipated evidence, which is not offered because the witness is present, when it would be if he were absent, and when the judge has doubted as to the excluded evidence, the appellee and his attorneys might well have thought it proper to offer it. We are disposed to encourage care and caution on the part of counsel in the preparation and trial of cases rather than the opposite. Again it does not appear upon what evidence the court acted, and it is to be presumed that it was sufficient.

It is not necessary to examine all the rulings as to the admission and exclusion of evidence. Evidence offered by the appellee tending to prove repairs made by him upon the building, which the court admitted, was strenuously objected to, and even after the question was fairly saved, the objection was continued to be urged in a manner which "did somewhat smack or savor, as it were," of unreasonable pertinacity. Afterwards, and after the evidence as to repairs by the defendant, and as to the damage, sustained in consequence of a want thereof, was all in, the judge presiding remarked that he had been thinking the matter over, and that it should not go in and, therefore, he overruled all the testimony, because, unless there was an express agreement on the part of the landlord to repair, the tenant should take the building, as a man did his wife, for better or for worse.

We concur with the court below in its last ruling. Still we would not be disposed, for the error alone of admitting and afterwards excluding this evidence, to reverse, if we could

Smith v. Kinkaid.

perceive that the admission could have done no harm; but it is plainly apparent from the evidence of the appellee himself, that repairs with damages consequent upon the neglect to make them, not consented to by appellant, were necessary elements to reduce the amount due for rent so much as to render a verdict for the appellee possible. The exclusion, therefore, of the improperly admitted evidence was, as is too generally the case, a mere theory, of no practical use to the appellant.

The appellant claims that the amount of the rent was one hundred and fifty dollars, computing from July 27th, 1875; appellee, that it was one hundred and eleven dollars and ten cents, computing from October 1st, 1875. If we take the one hundred and eleven dollars and ten cents, all the items of set-off claimed by appellee, excluding repairs not consented to, and damages claimed for want of them, and there will remain a small balance due appellant. Appellee, himself, in a note to Sanford, dated June 22d, 1876, gives the items and concedes a balance due appellant of five dollars and fifty cents, and this statement includes eight dollars damages for neglect to repair. With the eight dollars omitted, the balance would have been thirteen dollars and fifty cents due appellant.

We do not deem it necessary to examine particularly to ascertain whether one hundred and fifty dollars, or one hundred eleven dollars and ten cents, or some intermediate sum should be the minuend from which the sum of the claims of appellee should be taken. Appellee does not, as a witness, distinctly deny that he took the building from July 27th, 1875, although Sanford so testified, and that it was kept vacant for him till he took the keys, September 29th, 1875. According to appellee's own showing, there would have been a balance found due appellant, if the theoretically excluded items had never been admitted. Though the amount in controversy be small, the rules of law are the same as when amounts are larger. We are satisfied that justice has not been done in this case, and, therefore, for the errors aforesaid, it is

Reversed and remanded.

Mattingly v. Obley.

GEORGE MATTINGLY

V.

CHRISTIAN OBLEY.

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY.—The evidence shows that the property claimed by the wife as her separate property, belonged to her husband; and the claim set up by her was an after-thought, asserted for the purpose of defeating the creditors of the husband. The transaction, if it discloses any interest on the part of the wife, shows nothing more than a loan of her money to the husband for the purpose of carrying on business.

APPEAL from the Circuit Court of Carroll county; the Hon. WILLIAM BROWN, Judge, presiding.

Messrs. ARMOUR & SHAW, for appellant; that it will be presumed, in the absence of proof, that the common law was in force in Pennsylvania at the time the wife received money from her father's estate, and that it became the property of her husband, cited *Tinkler v. Cox*, 68 Ill. 119; *Dubois v. Jackson*, 49 Ill. 49; *Farrell v. Patterson*, 43 Ill. 52.

The presumption of law is, that the husband is the owner of all the property in the wife's possession, if they are living together: *Farrell v. Patterson*, 43 Ill. 52; *Brownell v. Dixon*, 37 Ill. 167; *Kahn v. Wood*, 82 Ill. 219; *Reeves v. Webster*, 71 Ill. 307; *Hackett et al. v. Bartley*, 10 Chicago Legal News, 135; *Stanton v. Kirch*, 6 Wis. 338; *Mazonk v. I. N. R. R. Co.* 31 Iowa, 559; Rev. Stat. 1874, 577.

Where the verdict is against the law, or against the weight of evidence, a new trial should be granted: *Higgins v. Lee*, 16 Ill. 500; *Schwab v. Gingerick*, 13 Ill. 698; *Clement v. Bashway et al.* 25 Ill. 200; *Ray v. Bulloch*, 46 Ill. 65; *I. C. R. R. Co. v. Chambers*, 71 Ill. 519.

Messrs. HUNTER & SMITH, for appellee; argued that a husband may act as agent for his wife in the control and management of her separate property, and cited *Brownell v. Dixon*, 37 Ill. 167; *Wortman v. Price*, 47 Ill. 22; *Sweeney et ux. v. Dawson et al.* 47 Ill. 450; *Dean v. Bailey*, 50 Ill. 481; *Dyer v.*

Mattingly v. Obley.

Keefer, 51 Ill. 525; McLowrie v. Partlow, 53 Ill. 340; Haines v. Haines, 54 Ill. 74; Bridgford v. Riddell, 55 Ill. 261

SIBLEY, P. J. The appellant in this case had, in October, 1877, levied several writs of attachment upon articles of personal property, described as one lumber wagon, one grain seeder, one fanning mill, three milch cows, two spring calves, one sucking colt, two corn plows, one drag, twenty-five shoats, three sows, seventeen pigs, six tons of hay, one hundred and twenty-five bushels oats, one McCormick reaper and mower, and one pair of bob-sleds, as the property of Frederick Shoaf, the defendant in the writs, which Obley, the appellee, soon afterwards replevied, claiming the same by virtue of a mortgage executed by Christine Shoaf, the wife of Frederick.

The principle question raised upon the trial was whether the property in dispute belonged to the wife, and, therefore, not liable to be seized by the constable upon the writs of attachments in favor of the husband's creditors.

After a very careful examination of the testimony in the case, the only conclusion to be arrived at, is that the verdict of the jury finding the issues in favor of the mortgagee is manifestly against the evidence. There are some minor points of error urged for reversing the judgment of the court below, which would probably justify a technical reversal, but we do not desire to place our decision upon that ground. While transactions very similar to the one detailed in this record are so constantly recurring, it is better for the community, and more satisfactory to the parties in interest, that the questions arising should be squarely met, and unhesitatingly decided upon the merits of the case.

That this claim of ownership set up by Mrs. Shoaf was an after-thought, never occurring to her until the seizure had been made by the officer on behalf of the creditors of Mrs. Shoaf, is too palpable to admit of any serious question. Take her own testimony, that she got money from her father, and gave it to her husband, while living in Pennsylvania, to buy land. That he afterwards sold the land and bought lots, which they ultimately disposed of; and she took her money out of

Mattingly v. Obley.

the proceeds, when they came West to this State, nine years previous. That before leaving the East her husband got her money \$750, brought it out here, and deposited it with Mr. Obley for safe keeping. It appears from the statement that this money was used by her husband at all times whenever he wanted it to purchase stock, or agricultural implements for his farm, and traded and disposed of what was purchased, as he saw fit without any interference or objection on her part. She permitted him to deal with the property in every respect as if he was the absolute owner of it. And if, as she says, the property as well as the increase of it, and whatever was procured by means of the original investment, was by a secret understanding between them to be hers, then she certainly was placing him in a false attitude, by clothing him with such an appearance of ownership as would enable him to obtain a fraudulent credit upon an unreal capital. During all these years her husband owned and cultivated the land upon which they resided, and, in the meantime, it is said, that the stock and farming implements procured, were purchased with her money, and, as the result of her capital, were her sole property.

If anything was sold, it was replaced with the proceeds, and by way of substitution became hers. Such an arrangement entered into by strangers would only be binding between the parties. But when this sort of an understanding is had between husband and wife; when the husband owns the farm, and uses and controls the personal property upon it, and the wife, by her silence, consents to such use and disposition, then after the husband has obtained credit upon the strength of being in possession, and the ostensible owner of the property, for the wife to turn around and claim that he had been using her money, with the private agreement between them that whatever might come into his hands should be considered her property, would be a fraud upon his creditors, and against the policy of the law, which is opposed to the possession of personal property being in one person, while the ownership is in that of another; as was said in *Henry et al. v. R. I. Locomotive Works*, 3 Otto, 664.

That a married woman may employ her husband to act for her as agent in the use and control of her property without any

Mattingly v. Obley.

prejudice to her right to it, is indisputably correct. But this must be done in good faith, and in the usual way that a principal manages his business through an agent. Here there was no pretense of any agency on the part of the husband to manage the affairs of the wife, and the money furnished by her to him, if any, should be treated, in respect to his creditors, according to the rule established in *Brownell v. Dixon*, 37 Ill. 198, and *Wortman v. Price*, 47 Id. 22, and adopted by this court in *Guill et al. v. Hanney*, decided at the December term, 1877, as a loan by the wife for the purpose of affording her husband additional aid in prosecuting his business.

It may be remarked, that among other irreconcilable statements of Mrs. Shoaf, is, that while she insists that her money paid for the property in controversy, she says, on cross-examination, that Mr. Shoaf sold hogs that were raised on the place, to get money to pay for the reaper; that he bought the wagon with hogs; got the grain-seeder with hogs; procured the fanning-mill with hogs; purchased the cows with hogs; bought the corn-plows with hogs; got the drag, and also, the bob-sled with hogs; so, that almost all of the articles in dispute were procured by Mr. Shoaf with hogs raised on the place owned and cultivated by him. The testimony of the two sons of Mrs. Shoaf, who speak in the same flippant manner, that the property in question was purchased with their mother's money, has not been overlooked. They appear quite ready to declare that it was hers, but confess their total inability to tell, when, how, and by whom, the purchase was made and paid for. Jacob does, indeed, say that the seeder and fanning-mill were "got of Mr. Cornelius," and that his mother paid for them. John testified that his mother got the money out of her trunk to buy the corn-plow. What became of it, and who she paid it to, he fails to give any information of. Now, what does Mr. Cornelius (who had no interest in the matter) say about Mrs. Shoaf paying for the seeder and fanning-mill. He swears that the seeder and fanning-mill, together with several other articles, were sold by him to Frederick Shoaf, and that Shoaf gave his note for the property; that Mrs. Shoaf was not present at the time.

Mattingly v. Obley.

Charles Wales also states that he sold Mr. Shoaf a McCormick reaper and mower, who settled for it by giving his note. So, the witness Hents testified that he sold Shoaf a wagon, and a corn-plow, and that Shoaf agreed to pay for them in wood, only two cords of which was ever delivered. Still, Mrs. Shoaf and her two sons are quite positive that her money paid for these articles.

Barton Messler says that he sold Shoaf a lumber wagon for \$80, and took Shoaf's note for it. If there is a particle of evidence in this whole record to show where a dollar of Mrs. Shoaf's money went to purchase any of the articles in controversy, we have been unable to find it. Her own conduct in respect to the property, previous to the present controversy, was so inconsistent with the claim of ownership now set up, as of itself to render that claim of little or no effect. John C. Spears testified that about a year before the execution of the mortgage by Mrs. Shoaf to the appellee, he being on intimate terms with the family, went to borrow a wagon of Mrs. Shoaf, who refused to lend it, remarking to him that it did not belong to her, and that he must wait the return of Mr. Shoaf, which he did, and after Shoaf came in, talking over the matter, he stated that all the things belonged to him, and for that reason his wife did not lend them. Soon after Shoaf had left the country with his debts unprovided for, the appellee went to Mrs. Shoaf to see what could be done to secure his claim. She proposed to give him a lien upon the property, and they went together to Frank Dyslin, a justice of the peace, when appellee asked the justice to draw up a mortgage, saying that Shoaf was owing him, and had run away, that he wanted to get a lien upon the property "before the creditors got it."

The justice told him that he did not think Mrs. Shoaf could execute a valid mortgage upon Mr. Shoaf's property. Appellee then said: "draw it up, and if it was not legal, there would be nothing lost." No claim was then made that the property belonged to Mrs. Shoaf, although she was present during the conversation, and intimated nothing of the kind.

P. S. Newcomb swears that when the constable went to levy

Rogers v. Powell et al.

his attachments, Mrs. Shoaf informed them that Obley had a chattel mortgage on the property, and he asked her what right she had to give this mortgage. She replied that "when the husband went away, the next had a right to dispose of it." To the same effect was her testimony before Justice Mastin on a former trial, and it is quite evident that the idea of claiming the articles in question as her sole property never occurred to her until it had been ascertained that she possessed no legal authority to mortgage the property of her husband, even though he had left the State and abandoned his family. We think the court erred in not awarding a new trial.

The judgment is therefore reversed and the cause remanded.

Judgment reversed.

A. C. ROGERS, Impl'd, etc.

v.

JAMES POWELL ET AL.

1. MECHANIC'S LIEN—SPECIAL CONTRACT—REQUISITES OF PETITION.—

Where a petition for enforcement of a mechanic's lien undertakes to set out a verbal agreement, between the petitioners and the defendant, to furnish materials, and that the defendant was to pay for the same within five or six months from the time the same was delivered, it becomes a special contract and it is also necessary to allege the time when the materials were delivered.

2. IMPLIED CONTRACT—PLEADING TO BE TAKEN MOST STRONGLY AGAINST THE PLEADER.—Under the present statute a party may declare upon an implied contract, or upon one partly express and partly implied, but there being no intimation in this case of an implied contract, an allegation of some portions of the contract and a failure to allege other portions leads to the inference that the unstated portions were such as could not with safety be averred.

3. SALE UNDER DECREE—PAYMENT OF SURPLUS.—In a petition for a mechanic's lien, where there is a mortgage upon the property sought to be charged, a decree of sale under such petition should direct that if any surplus arises at the sale, it should be paid over to the holder of the mortgage, or held subject to the further order of the court.

4. LIEN AGAINST SUBSEQUENT INCUMBRANCERS.—A mechanic's lien cannot be enforced against any incumbrance unless suit is brought to enforce the same within six months after the last payment becomes due.

Rogers v. Powell et al.

ERROR to the City Court of Aurora; the Hon. R. G. MONTONY, Judge, presiding.

Mr. CHARLES D. F. SMITH, for plaintiff in error; arguing that the contract set forth in the petition was an express contract, cited *Powell v. Webber*, 79 Ill. 134; *Fish v. Stubbings*, 65 Ill. 492.

That being an express contract, the time within which the materials were to be furnished should be stated in the contract and set forth in the petition: *Powell v. Webber*, 79 Ill. 134; *Fish v. Stubbings*, 65 Ill. 492; *Cook v. Vreeland*, 21 Ill. 431; *Moser v. Mott*, 24 Ill. 91; *Cook v. Rofinat*, 21 Ill. 437; *Coburn v. Tyler*, 41 Ill. 354.

Mr. M. O. SOUTHWORTH, for defendants in error; contending that under the statute of 1861, a lien is good if the work is done or materials actually furnished within one year, whether any such agreement was made or not, cited *Coburn v. Tyler*, 41 Ill. 354; *Baxter v. Hutchings*, 49 Ill. 120; *Corey et al. v. Cockey et al.* 57 Ill. 252; *Roach et al. v. Chapin*, 27 Ill. 197; *Orr v. Northwestern Mut. Life Ins. Co.* 10 Chicago Legal News, 166.

SIBLEY, P. J. ON the 14th of February, 1874, James Powell and Charles Barrett filed a petition in the City Court of Aurora against Henry C. Stout and Mrs. A. C. Rogers to enforce a mechanic's lien upon a lot of ground situated in that place, for furnishing a quantity of lumber and materials to Stout for the purpose of erecting a frame building upon the lot of which he was the owner.

The petition alleges that the petitioners, about the month of February, 1873, entered into a verbal contract with Stout to furnish him lumber and building material to construct a house upon this lot. That Stout was, by virtue of the agreement, to pay the petitioners for the materials to be furnished within five or six months from the time the same were delivered. That in pursuance of this agreement the petitioners did, from time to time, deliver to Stout a large amount of materials

Rogers v. Powell et al.

for the erection of the building, and that the same were delivered before July, 1873, and used in the construction of the house. That Stout was the owner of the premises, and had failed to pay for the lumber and materials furnished. That Mrs. A. C. Rogers had a mortgage upon the premises subject to their lien, and prayed that she be made a party defendant to the petition.

In March, 1874, the defendants were defaulted and a decree taken against them, which recited that it appeared Stout was indebted to the petitioners in the sum of \$733.90, and that the same, by the terms of the contract, became due on the first of July, 1873. That Mrs. Rogers had a mortgage on the premises, which was made after the materials were furnished by the petitioners, and was subject to their lien.

The decree further provided, that in case Stout should make default in the payment of the amount found due the petitioners within twenty days, the premises should be sold by the Master in Chancery of that Court, and the proceeds of the sale be applied first to the payment of the costs and debt in that proceeding, and the surplus, if any, to be paid over to the defendant Stout. Mrs. C. A. Rogers has brought the record of that proceeding to this court, and assigned several errors for reversing the decree of sale.

First: That the petition in the case is substantially defective, and should have been dismissed on the hearing.

As the decree will have to be reversed, and leave granted to amend the petition, it does not become necessary to decide all the points made. But it may, however, be observed that inasmuch as the petition undertakes to set out a verbal agreement made by the petitioners with the defendant Stout, in February, 1873, to furnish lumber and building materials to construct a house on lot No. 9, in the city of Aurora, and that Stout was, by virtue of the agreement, to pay the petitioners for the lumber and materials to be furnished within five or six months from the time the same were delivered; that this, according to the principle established in *Fish v. Stubbins*, 65 Ill. 492, and *Powell et al. v. Webber et al.* 79 Id. 134, was a special contract, and that, in such case, it became necessary to allege the time

Rogers v. Powell et al.

when the materials were, by the terms of it, to be delivered.

It is not to be disputed that under the present statute a party may declare upon an implied contract, or where the contract is partly expressed and partly implied. But there is no intimation in the contract set out in this case that any part of it was implied. Hence, the inference by all the rules of correct pleading would be that the pleader, after having stated a part of the agreement, and being silent as to the other portions of it, that the unstated portions were such as could not with safety be averred. Thus, in not stating the time, the inference would be that the period agreed upon for the delivery of the materials was beyond the time limited by the statute. Again, the petition alleges that the materials were delivered before July, 1873; how long before that time it does not appear. The decree, it is true, finds the fact to be that it was delivered long enough before July to make the payments, by the terms of the contract, due at that time.

By section 28 of the Revised Laws of 1874, in relation to liens, it is provided that "no creditor shall be allowed to enforce the lien created under the foregoing provisions as against, or to the prejudice of, any other creditor or any incumbrance, unless suit be instituted to enforce such lien within six months after the last payment for labor and materials shall have become due and payable."

The decree recites that the court found from the evidence the amount due the petitioners for materials furnished to the defendant, Stout, by the terms of the contract, became payable on the first day of July, 1873, and also that the plaintiff in error held a mortgage upon the premises described in the petition, but that it was subject to the lien of the petitioners. This was certainly an erroneous conclusion, for the statute is very explicit that such a lien cannot be enforced against any incumbrance unless suit is brought within six months after the last payment becomes due. By this decree it appears that the payments were all due on the first of July, 1873, and suit was not commenced until the 14th of February, 1874, more than seven months afterward. That Mrs. Rogers' mortgage was an incumbrance is conceded in the petition and proven by the decree.

Town of LaSalle v. Blanchard.

Then upon the facts found, her lien had the preference. But even suppose that it was as decreed, subject to the lien of the petitioners, why she should have been cut off from receiving the surplus, if any, after the payment of their claim, is a little difficult to understand. She was prevented from bidding at the sale, as the decree directed that if any surplus was realized it should be paid over to the defendant, Stout. By the well settled rule in such a case, the surplus should have been ordered to be paid over to the subsequent incumbrancer, or held subject to such further direction as the court might see fit to decree. See *Hart et al. v. Wingart*, 83 Ill. 282, and authorities referred to.

Whether the Master in Chancery of the Aurora City Court had a right to advertise and sell the property, outside of the territorial jurisdiction of that court, we do not deem it necessary to decide, since the difficulty can be easily obviated upon any sale that may hereafter be ordered by directing it to be made upon the premises.

For the reasons indicated, the decree is reversed and the cause remanded, with leave to the petitioners to amend their petition.

Decree reversed.

THE TOWN OF LASALLE
v.
GEORGE L. BLANCHARD.

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1. **SUIT BY TOWN AGAINST AN OFFICER—ACTION ON HIS BOND NOT EXCLUSIVE.**—In an action by a town in its corporate capacity to recover money received by one of its officers to its use, the remedy by action upon his official bond is not exclusive, but the town having the capacity by statute to sue and be sued may have its remedy at common law therefor.

2. **TREASURER OF HIGHWAY COMMISSIONERS—NOT ENTITLED TO COMMISSIONS FOR PAYING OUT MONEY.**—The act of 1872, allowing the treasurer of the commissioners of highways, commissions upon all sums received and paid out by him, was superseded by the act of 1873, and a treasurer of such commissioners is not entitled to retain, as commissions, two per cent. of the

Town of LaSalle v. Blanchard.

moneys of the town received and paid out by him for road purposes during the year 1874.

3. CONSTRUCTION OF STATUTE—RETROACTIVE LAWS.—It was insisted by appellee that the statute of 1875, allowing such commissions was retrospective, and this gave him authority to retain such commission. *Held*, that the statute was not retrospective. Courts will not give to a law a retroactive operation, even where they might do so without violation of the Constitution, unless the intention of the Legislature be clearly expressed in favor of such retrospective operation.

4. CONSTITUTIONAL PROHIBITION.—The Constitution declares that the General Assembly shall never grant or authorize extra compensation or allowance to a public officer after service rendered, hence the claim of appellee to such commissions under the Act of 1875, cannot be sustained on the ground that the statute is retroactive, for it would then be doubtful if the Act itself could be sustained.

ERROR to the Circuit Court of LaSalle county; the Hon. EDWIN S. LELAND, Judge, presiding.

MESSRS. DUNCAN & O'CONNOR and Mr. E. F. BULL, for plaintiff in error; that a person accepting a public office to which is attached a fixed compensation, must be content with such compensation, and no promise to pay extra for additional duties is binding, cited *City of Decatur v. Vermillion*, 77 Ill. 315; *Dillon on Municipal Corporations*, § 172.

Mr. G. S. ELDREDGE, for defendant in error; that the cause having been tried by the court below without a jury and no motion for a new trial made, the finding of the court cannot be assailed, cited, *Bills v. Stanton*, 69 Ill. 51; *Smith v. Gillett*, 50 Ill. 290; *Evans v. Lohr*, 2 Scam. 511.

That towns are not represented in a municipal capacity by "corporate authorities" with general power to sue and be sued: *Dillon on Municipal Corporations*, § 9; *People v. Mayor*, etc., 51 Ill. 18; *Marshall v. Sethman*, 61 Ill. 218.

PILLSBURY, J. The appellee, Blanchard, was elected Highway Commissioner in April, 1874. He was, by the Board of Highway Commissioners, chosen treasurer, which position he accepted and held during his term of office as commissioner.

In the year 1874, the township of LaSalle erected a bridge across the Illinois River at Shippingsport, costing upwards of

Town of LaSalle v. Blanchard.

\$80,000. To pay for this bridge the town issued \$82,000 in bonds of the township, which were either delivered to the contractors by appellee, or disposed of by him, and the proceeds paid to them. It appears that all the bonds and moneys raised for road and bridge purposes passed through the hands of appellee, out of which he retained two per cent. as his commissions. The commissions claimed by appellee for the year 1874, amounted to a large sum, which he refused to pay over to his successor or to account to the town therefor otherwise than as commissions due him for handling the funds of the town.

The town brings this suit in its corporate capacity against appellee to recover the amounts thus retained by him, insisting that during the official year of 1874, he was not entitled to commissions.

In the court below, the court allowed him two per cent. upon all sums paid out by him, and the plaintiff excepted to such finding, and appeals to this court and assigns such action of the court for error. A single cross-error has been assigned by appellee, that the court should have dismissed the suit because the town cannot recover in its corporate capacity against the appellee. The reason assigned is, that appellee gave bond, and the remedy is upon it, that the statute has not, in terms, given this action.

We are of the opinion that the action upon the bond is not exclusive; that the statute authorizes the town to sue or be sued, and having the capacity to sue, has its remedy at common law to recover money had and received to its use the same as an individual. The giving of the bond under the statute is but an additional security, and does not supersede the common law remedy.

The appellee, to the town, stands in the relation of an agent who, having collected his principal's money, refuses to account for it. Cooley on Taxation, 497, and authorities cited.

There is no error in this regard.

Was the appellee entitled to a commission of two per cent. upon moneys paid out by him during the year 1874? By the act of 1872, in force August 15 of that year, for the first time treasurers of the highway commissioners were allowed

Town of LaSalle v. Blanchard.

commissions upon all moneys received and paid out by them, except such as they should pay over to their successors.

This act remained in force until April 11, 1873, when it was superseded, by act of that date, the 126th section of which expressly repeals the act of 1872. By the act of 1873, treasurers of highway commissioners received no compensation for receiving and disbursing road and bridge funds. It is conceded by the appellee that there was no statute in force from the time of his election in 1874 until April 15th, 1875, allowing him commissions as treasurer, but it is claimed by him that the act of the latter date, session laws of 1875, page 111, has a retroactive effect, thereby entitling him to retain two per cent. for moneys already disbursed by him during 1874.

That act is entitled, "An act to provide for the election of commissioners of highways in counties under township organization, and to legalize the election and official acts of such as were elected in the year 1874 and 1875, and to fix the compensation of the treasurer of such commissioners."

The first section provides for the election of one commissioner of highways in each town, who shall hold his office for three years, and until his successor is elected and qualified.

The second section legalizes the official acts of those elected in 1874 and 1875. The third section is as follows: "The treasurer of the Board of Highway Commissioners shall receive for his services as such treasurer two per cent. on all moneys he may receive and pay out, except such moneys as he may pay over to his successor in office." Courts will not give to a law a retrospective operation, even where they might do so without violation of the Constitution, unless the intention of the legislature is clearly expressed in favor of such retrospective operation.

This rule applies with the greater force where, by giving the law such effect, a serious question would be raised as to the constitutionality of the act. Where a statute can, consistent with the rules of interpretation, be so construed as to harmonize with the Constitution, such construction will be adopted by the courts, rather than one which will raise an apparent conflict between the law and the Constitution.

Town of LaSalle v. Blanchard.

The Constitution of this State, article IV., section 19, provides that: "The General Assembly shall never grant or authorize extra compensation or allowance to any public officer, agent servant or contractor, after service rendered or contract made," etc. It is clear, in this case, that the larger portion of the claims of appellee for compensation, was for services rendered in 1874, and before the passage of the act of 1875, and when, it is admitted, there was no statute allowing him commissions, therefore, to say the least, it may well be doubted whether the statute of 1875, even if it purported to be retrospective, could be sustained. If it be true, as suggested, that the failure to make provision for the compensation of treasurers of highway commissioners, in the act of 1873, was through inadvertence, still we cannot aid the appellee, for the courts cannot correct supposed errors, omissions, or excesses of the legislature. *Waller v. Harris*, 20 Wend. 561, 562. We are unable to see that the statute of 1875 was designed to be retrospective in its operation.

There was no provision in the act of 1873, declaratory of the time and manner of the election of highway commissioners, although the office was fully recognized by the act, in its various sections, prescribing the duties of such.

Elections were held for one highway commissioner, with other township officers, at the annual town meeting in 1874 and 1875. The persons so elected, qualified and entered upon the duties of the office, and the act of 1875, so far as it purports to have a retrospective effect, simply legalizes the election and official acts of those elected and acting as such commissioners.

It is urged that the portion of the title of the act, reading, "and to fix the compensation of the treasurer of such commissioners," refers to those elected in 1874 and 1875, and, therefore, makes the third section retrospective.

We do not so understand it.

It must be remembered that a statute is to be read without breaks or stops, and it is never clear that words belong to any particular branch of a sentence. *Perteet v. People*, 65 Ill. 230, and that such construction ought to be put upon a statute

Town of LaSalle v. Blanchard.

as may best answer the intention which the makers had in view. *Decker v. Hughes*, 68 Ill. 33.

Now if the word *such* in the title refers to the commissioners elected in 1874 and 1875, and is to have a controlling influence in construing the third section, as applying to the treasurer of those commissioners, then the third section is wholly retrospective in its character and of no prospective force whatever, which clearly was not the intention of the Legislature. We think the statute itself clearly explains its title.

It provides for the election of commissioners of highways and fixes the compensation which the treasurer of *such* commissioners shall receive. So far it supplies all the defects claimed to exist in the act of 1873.

The second section does not purport to supply any omission in the prior act, but simply makes legal such official acts as were otherwise valid under the other provision of the statute.

The words of the third section do not of themselves indicate a legislative intent that the statute should have a retroactive effect, and had the title of the act expressed the legislative intent as clearly as the act itself, there would be no ambiguity whatever; the title would then have read, "An act to provide for the election of commissioners of highways in counties under township organization, and to fix the compensation of the treasurer of such commissioners, and to legalize the election and official acts of such commissioners as were elected in the years 1874 and 1875." Such, we think, is the correct construction of the title and of the act itself.

It therefore follows that the appellee was not entitled to any commissions from the time of his election to the fifteenth day of April, 1875. He accepted the office of treasurer, to which the law attached no compensation; he has already received \$300 as pay for his services as commissioner for that year. We are unable to see what claim he has against the township of LaSalle. If he was not satisfied to assume the responsibilities of treasurer without fees, he was under no obligation to do so; he voluntarily accepted the office and must perform its duties for the compensation fixed by the law. He has received large sums of money collected from the taxpayers of the

Thompson et al. v. Scott et al.

township for the special purpose of improving the roads and bridges of the townships; he has no right to retain the same in violation of the law and must account for it, to the end that it can be used for the purposes for which it was raised.

This conclusion renders it unnecessary to determine the point made, that the bonds of the town were not money upon which, in any event, appellee could retain two per cent. For the reasons above stated, the judgment must be reversed and the cause remanded.

Judgment reversed.

LELAND, J., took no part in the decision of this case.

LEWIS W. THOMPSON ET AL.

V.

ELEANOR C. SCOTT ET AL.

1. INSTRUMENT IN THE NATURE OF A MORTGAGE—AGREEMENT BY MARRIED WOMAN.—Appellant's intestate, in his lifetime, conveyed to appellee S., a married woman, certain land, and took from her an instrument in the nature of a mortgage to secure the deferred payments, her husband not joining in such mortgage. Appellee S. afterwards conveyed the premises to C., subject to the lien of the vendor aforesaid, who in turn conveyed the premises to P. and W., with notice of the lien, and who purchased subject thereto. *Held*, that although a deed or mortgage executed by a married woman without her husband joining is void as a conveyance of real estate as to her, though of her separate estate, that was not the question in this case; but whether a married woman can make any kind of a contract in writing by which, in equity, she can create a lien upon her real estate to secure her indebtedness for an unpaid portion of the purchase money.

2. SUCH AGREEMENT GOOD IN EQUITY.—Although such an agreement would not operate as a mortgage by reason of the disability of coverture, it is valid in equity to create a lien or security for the debt.

3. LACHES.—It was insisted that appellants, were guilty of such laches as should prevent them from having relief under a claim of a vendor's lien; but appellees having expressly agreed to pay the unpaid purchase money, and having deducted that amount from the price they agreed to pay, it does not become them to complain of laches which they could so easily have prevented by paying an honest debt.

4. VENDOR'S LIEN.—Appellees having actual notice of the unpaid

Thompson et al. v. Scott et al.

purchase money, and having assumed to pay it, whether the mortgage is a good contract in equity, or an absolute nullity, there is a vendor's lien here for an amount which they have agreed to pay, and equity and good conscience require that they should do so.

APPEAL from the Circuit Court of Mercer county.

Mr. H. BIGELOW, for appellants; that the instrument created a lien upon the premises that would be enforced in equity, cited, Carpenter v. Mitchell, 54 Ill. 126; Markoe et al. v. Andras, 67 Ill. 34.

That the subsequent grantors having taken the land subject to the mortgage, they cannot now be permitted to gainsay it: Hatch v. Morris et al. 3 Ed. Ch. R. 314.

While the attempted mortgage did not as such *create* a lien, it nevertheless *preserved* one: Morrison v. Brown, 83 Ill. 562.

The grantee, though a married woman, had the power while she owned the property, to charge it with her debts, provided she executed an instrument in writing manifesting an intention so to do: Williams v. Hugunin, 69 Ill. 214; Yale v. Derderer, 22 N. Y. 450.

Messrs. PEPPER & WILSON, for appellees; contending that the mortgage or conveyance was void, cited Morrow v. Brock, 12 Ill. 273; Hughes v. Lane, 11 Ill. 128; Lane v. Lowland, 15 Ill. 123; Garrett v. Moss, 22 Ill. 363; Gove v. Catlin, 23 Ill. 634; Russell v. Ramsey, 35 Ill. 370; Lindley v. Smith, 46 Ill. 524; Board of Trustees v. Davison et al. 65 Ill. 125.

That a mortgage not executed in the manner prescribed by statute is void: Moulton v. Hurd, 20 Ill. 137; Cole v. Van Riper, 44 Ill. 58; Bressler v. Kent, 61 Ill. 426; Lewis v. Graves and Elder v. Jones, Sup. Ct. Ill. 1877.

LELAND, J. The Court below sustained a demurrer to an amended bill in chancery, filed by appellants in Mercer county. The bill as amended was in substance as follows, viz:

On the 4th day of Dec., A. D. 1861, James S. Thompson, then in his lifetime, but since deceased, was the owner and

Thompson et al. v. Scott et al.

seized in fee of certain lands situated in the county of Mercer, described in the bill.

On that date he agreed to sell said land to the defendant, Eleanor C. Scott, then and since the wife of the defendant, James H. Scott, for the sum of \$500, and the said Eleanor C. Scott agreed to purchase said land on the following terms, to wit: \$150 cash, \$120 two years, \$115 three years, and \$115 four years after that date, with interest on the deferred payments at the rate of ten per cent., payable annually.

That Thompson was to convey and did convey the land to said Eleanor Scott, by deed of warranty, and which was duly recorded, etc., and it was then agreed that he should have and retain an express lien thereon to secure the unpaid purchase money.

That as a part and parcel of the agreement, the said Eleanor C. Scott executed and delivered to said Thompson her three promissory notes for said deferred payments, due two, three, and four years after date.

That as a further part of said agreement, the said Eleanor C. Scott, in order to more fully evidence the fact that the said Thompson was to have and retain an express lien on said land to secure said unpaid purchase money, executed, acknowledged and delivered her certain instrument in writing, under seal, in the form of a mortgage; that the mortgage was duly recorded, etc.

That the execution of the deed from Thompson, and the execution of the notes and the instrument in the form of a mortgage to secure them, by the said Eleanor C. Scott, was all, in fact, one transaction; that the said Thompson intended to retain, and the said Scott agreed that he should have an express lien on the lands to secure said unpaid purchase money. That but for said agreement the said Thompson never would have conveyed said land; and that all of the defendants well knew all of these facts before they obtained any interest in the property.

That Thompson departed this life intestate about the 23d day of July, A. D. 1868, leaving him surviving Nancy S. Thompson, his widow, and Josie T., Vic., Grace, Emily and Stella, his children and sole heirs at law.

Thompson et al. v. Scott et al.

That on the 22d day of August, A. D. 1868, Lewis W. Thompson and Nancy S. Thompson were appointed his administrators. That the administrators have long since from the personal effects of the deceased paid all of his debts; and that the moneys due from the defendants, or any of them, belong to the widow and heirs of the deceased.

That upon the execution and delivery of the deed from Thompson to Scott, the said Eleanor C. Scott entered into possession of the premises conveyed, and continued to occupy them until the 26th day of January, A. D. 1871, when she sold and agreed to convey them to appellee Cochrane, and attempted to make a deed therefor; but a mistake having been made in the description of the land, she afterwards, and on the 15th day of February, A. D. 1871, executed to Cochrane another deed properly describing the premises.

That at the time the said Eleanor C. Scott sold and conveyed the land to Cochrane, she informed Cochrane of the existence of Thompson's claim, and that as a part of the purchase price by Cochrane from Mrs. Scott, Cochrane agreed to pay the money due Thompson, which was secured by said attempted mortgage lien. That the words "subject to all incumbrances," which were written in the deed from Mrs. Scott to Cochrane, referred to and embraced the Thompson lien on the land.

That Cochrane accepted the deed and possession of the land subject to the lien due Thompson from Mrs. Scott. That the negotiation between Cochrane and Mrs. Scott was conducted on the part of Cochrane by Sam. H. Ward, husband of appellee, Lucy D. Ward, and Jeremiah Pulver, husband of appellee, Clarissa Pulver. That Cochrane was but a tool of Ward and Pulver. That Lucy D. Ward is the daughter of Jeremiah Pulver. That neither Cochrane, Ward or Pulver paid the real value of the property at the time of the purchase, and had not Cochrane, by his agents, Ward and Pulver, agreed with Mrs. Scott that the Thompson lien should be paid, and that the property should stand fully charged with the lien, Mrs. Scott would never have executed any conveyance to Cochrane. That Cochrane's name was used by Ward and Pulver in the transaction for the purpose of defrauding the orators.

Thompson et al. v. Scott et al.

That on the 29th day of August, A. D. 1871, appellee Cochrane executed and delivered to appellees, Lucy D. Ward and Clarissa Pulver, a deed of said premises.

That the transaction was conducted on behalf of appellees Ward and Pulver, by their husbands, Sam. H. Ward and Jeremiah Pulver, that as a part of the purchase price from appellee Cochrane, appellees Lucy D. Ward and Clarissa Pulver, agreed to pay off and satisfy the Thompson lien, and that said lien was to remain and continue in full force. That all of the money evidenced by the notes from Mrs. Scott to Thompson was then due, except the interest to December 4th, A. D. 1863, which had been paid and endorsed thereon. That appellees Ward and Pulver well knew that the orators relied upon the lien evidenced by the attempted mortgage from Mrs. Scott to James S. Thompson (deceased), as security for the original purchase money due from Mrs. Scott.

That Eleanor C. Scott occupied the premises from December 4th, A. D. 1861, to February 15th, A. D. 1871, that since the latter date, appellees, Lucy D. Ward and Clarissa Pulver, by themselves or tenants have occupied said premises, that the reasonable rental value thereof was \$150 per annum. That appellees, or some of them, have made slight improvements on the premises, but that the reasonable rental value of said premises far exceeds the amount paid by Mrs. Scott on the purchase money, with the value of the improvements added. That appellees Eleanor C. Scott, Roswell Cochrane, Lucy D. Ward and Clarissa Pulver, are wholly irresponsible and have no property other than the lands conveyed by Thompson (deceased), out of which the money due therefor can be made. That the orators have applied to all of appellees to pay said moneys; that Mrs. Scott insists that Cochrane took the property subject to the claim, and agreed to pay it, and Cochrane insists that Mrs. Ward and Mrs. Pulver took the title to the property and as a part of the purchase price agreed to pay the claim, and Mrs. Ward and Mrs. Pulver, insist that, although they agreed to pay the claim, the property is not bound therefor, and that they intend to hold it in spite of the orators.

That the acts and doings of Lucy D. Ward and Clarissa

Thompson et al. v. Scott et al.

Pulver with their husbands, are fraudulent, unjust and grossly inequitable towards the orators. That appellees Ward and Pulver have no interest in the property, except such as they acquired from Cochrane, and that their rights in the premises are subordinate to the rights of the orators.

Prayer that Lewis W. Thompson and Nancy S. Thompson, administrators, &c., may be decreed an equitable lien on said premises for said unpaid purchase money, and that they may be sold by the Master in Chancery to pay said claim, or that apppellees, Lucy D. Ward and Clarissa Pulver, be decreed within some short day to pay said unpaid purchase money, and in default thereof, that they convey the property to orators, Josie T. Brown, Vic. Thompson, Grace Thompson, Emily Thompson and Stella Thompson, or that the deed from James S. Thompson (deceased), to Eleanor C. Scott be annulled, and held for naught, and that appellees be required to surrender the possession of the property to orators, heirs of James S. Thompson (deceased), and that orators may have other and different relief, &c. Copies of the deeds and other documents are attached to the bill as exhibits. There was a decree dismissing the bill, from which complainants appealed. It is claimed that appellants have been guilty of laches, which should prevent them from having relief under a claim of a vendor's lien.

As the Bill was demurred to, that question is not before us. That defense should have been set up in an answer. *Harris v. Cornell*, 80 Ill. 54; *O'Hallaman v. Fitzgerald*, 71 Ill. 53; *Beach v. Shaw*, 57 Ill. 17; *Hall v. Fullerton*, 69 Ill. 448; *School Trustees v. Wright*, 11 Ill. 606.

There was no such laches, however, as should prevent complainant's from having the relief prayed for, if otherwise entitled to it. Appellees expressly agreed to pay the unpaid purchase money for Mrs. Scott, and deducted the amount from the price which they agreed to give for the lot. It does not become them to complain of laches which they could so easily have prevented by paying an honest debt.

We will now consider briefly whether a court of equity can enforce the performance of that which the moral code so

Thompson et al. v. Scott et al.

plainly requires should be done, if the facts alleged in this Bill be true.

We are aware that, notwithstanding the act of February 21, 1861, a deed or mortgage executed by a married woman, without her husband joining, is void as a conveyance of real estate as to her, though of her separate estate. *Bressler v. Kent*, 61 Ill. 426; *Cole v. Van Riper*, 44 Ill. 58; *Lewis v. Graves*, 84 Ill. 205; Judge Breese, who wrote the opinion in *Young and wife v. Graff*, 28 Ill. 20, overruled in *Bressler v. Kent*, dissented in *Cole v. Van Riper*, *supra*.

The doctrine of these two last mentioned cases, never was fully approved by the bar

The question in this case is not whether a married woman can make a conveyance of real estate without her husband joining, but whether she can make any kind of a contract in writing by which in equity, she can create a lien upon her real estate to secure her indebtedness for an unpaid portion of the purchase money. If the writing in question, called a mortgage, were not a conveyance of real estate, but merely a simple contract in writing, it would most unquestionably have been valid in equity to create a lien or security for the debt. Consequently, if the seal had been accidentally omitted, or if the writing had simply stated that she owed the debt aforesaid for the purchase money, and owned the real estate, and that Thompson, deceased, should have a lien on the land for the debt, it would have created a valid arrangement to be enforced in equity. See *Carpenter v. Mitchell*, 54 Ill. 126; *Martin v. Robson*, 65 Ill. 129; *Parent v. Callerand*, 64 Ill. 97; *Greenleaf v. Beebe*, 80 Ill. 520; and other cases as to her power to contract in relation to her real estate generally, and under the authority of *Morrison v. Brown*, 83 Ill. 562, the recording of it would have been constructive notice. Nor would a written statement that the writing was "given to secure payment of a part of the purchase money for the premises" be rendered inoperative because found in a trust deed or mortgage, made by a married woman without her husband joining in it. Such a truth may be told by her, and there is no law to render its utterance ineffectual, as is well said in that case.

Thompson et al. v. Scott et al.

Though the decision in *Lewis v. Graves* is apparently against appellants, yet when we consider the two together as parts of one whole, the reasoning is rather the other way.

In *Lewis v. Graves*, the declared intent in writing is treated as non-existing. In *Morrison v. Brown*, as creating the lien, the former is treated as a case of declaring a lien on real estate by decree in equity to secure an unsecured note. The latter treats the written statement placed on record as creating a lien to be enforced in equity, and notice of the writing by recording, is notice of the lien in equity. In the former, as well as in the latter, the writing was recorded, and if the writing in either case created the equity, there was constructive notice. In the case at bar, it was both actual and constructive. It seems to us that the fallacy in *Lewis v. Graves*, if there be one, is in not considering the writing as creating the lien, because it was not merely a contract in writing, but because it was also in a deed. In this regard the two cases conflict. There was a distinction between *Lewis v. Graves* and *Bressler v. Kent*, not noticed in the opinion on page 205 of the 84th Ill. There was a question whether Mrs. Winters, whose husband lived in Iowa, was a *sole trader*, according to our decisions, and capable to contract as such. *Anderson v. Jackson*, 66 Ill. 522; *Love v. Moynehan*, 16 Ill. 277; *Prescott v. Fisher*, 22 Ill. 390.

The case at bar is infinitely stronger for appellants than *Morrison v. Brown* was for Mrs. Brown. There is no mistake in this case about the writing having been intended to create a lien for the unpaid purchase money, and that appellees not only so understood it, but that they actually deducted the amount from the price they paid, and agreed to pay it as a part of their purchase money. Can it be that under such circumstances they can keep the land and not pay the agreed price? Are courts of equity established to foster, protect and encourage the very converse of the name they bear? The case of *Hatch v. Morris*, 3 Ed. Ch. (N. Y.) 313, is one like *Morrison v. Brown*, and the latter seems to us just like the one under consideration, except not as strong for appellants as this, for the reasons above stated. The mortgage in the New

Thompson et al. v. Scott et al.

York case was that of a married woman, invalid as a conveyance of real estate, because her husband did not join in its execution, but upheld as a contract by her, creating an equitable lien, because, to use an expression found in *Lewis v. Graves*, she had expressed her desire to create such a lien by her act in signing the mortgage.

The vice chancellor very justly says: "Indeed, in equity there is a lien for unpaid purchase money as between vendor and vendee and all subsequent purchasers and mortgagees with notice." Whether the doctrine of *Bressler v. Kent* and *Lewis v. Graves* may be sound or not, is perhaps a question which we ought not to consider too curiously. Be that as it may, it would be monstrously inequitable to say in this case to appellees, alleged to be insolvent, keep your land and the main portion of the price you actually agreed to pay for it; that if there be any remedy for such injustice, it is not to be found in a court of equity and good conscience.

We think there are distinguishing features enough between this case and those of *Cole v. Van Riper*, *Bressler v. Kent* and *Lewis v. Graves*, not to render it necessary to shock our sense of justice by an affirmance of the decree in this case.

If, however, the decisions were just in point, we would feel bound by them, knowing full well that a general principle oftentimes operates unjustly in a particular case, and that it is the yielding to the pressure in bad cases which makes bad law. Appellees Ward and Pulver having actual notice of the unpaid purchase money, and *having* assumed to *pay it*, whether the mortgage is a good contract in equity, or an absolute nullity, there is a vendor's lien here for an amount which appellees Ward and Pulver *have agreed to pay*. Equity and good conscience require that they should do as they agreed to.

The decree is therefore reversed and the cause remanded.

Reversed and remanded.

INDEX.

ACCEPTANCE.

WHAT CONSTITUTES.

1. *Must correspond with offer.*—An acceptance, to be good, must in every respect meet and correspond with the offer made, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. *Fox v. Turner,* 153

2. *Time of, when made by letter.*—The acceptance of a proposition communicated by letter, is complete on the delivery of such acceptance to a messenger to be carried to the proposer, and the contract is binding from that point of time and not from the date of its delivery to the proposer. *Fox v. Turner,* 153

ACTIONS.

VENUE.

1. *In Local.*—Where an injury has been caused by an act done in one county to land situated in another, the venue may be laid in either, in an action before a justice of the peace. *Pilgrim v. Mellor,* 448

WHEN TO BE BROUGHT.

2. *Premature performance of condition precedent.*—Where the money, which formed the subject matter of this suit, was to be paid upon the dismissal of a suit then pending, an action begun before dismissal of such former suit, is premature. *Fabbri v. Cunio,* 240

ADMINISTRATION OF ESTATES.

SURVIVING PARTNER.

1. *Statute relating to duties of.*—The statute of this State relating to the duties of a surviving partner in the management of the partnership estate, is but declaratory of what the law was before its enactment. It provides some additional remedies, but does not change the rights or duties of the parties, only the mode of performing them. *Forrester, Ex. v. Oliver, Adm'r, et al.,* 259

2. *Liable for losses—Common law rule.*—The death of one member of the firm works a dissolution of the partnership, and terminates the power of the surviving partner to carry on the business, or to engage in new transactions, contracts or liabilities on account thereof. If he continues the business, it is at his own risk, and he will be liable to account for the profits made, or to be charged with interest on the deceased partner's share of the surplus, besides bearing all losses. *Forrester, Ex. v. Oliver, Adm'r, et al.,* 259

ADMINISTRATION OF ESTATES.

SURVIVING PARTNER. *Continued.*

3. *Relation of surviving partner to the legal representatives of deceased partner.*—On the death of one member of the firm, the relation of trustee and *cestui que trust* is created between the surviving partner on the one hand, and the legal representatives of his deceased partner and the creditors of the firm on the other; the terms of the trust being, that he will, without delay, proceed to close up the business of the firm as required by statute. *Forrester Ex. v. Oliver, Adm'r, et al.*, 259

EXECUTION AGAINST EXECUTRIX.

4. *General execution cannot be awarded.*—It is irregular to award a general execution against an executrix; the judgment should be made payable in due course of administration. *Rauh, Exr., v. Ritchie, Exr.*, 188

ADULTERY.

CONDONATION.

1. *Subsequent cohabitation.*—Condonation of the adulterous act will not be inferred from the fact of subsequent cohabitation, where it appears that at the time of such cohabitation the former adulterous act was unknown. *Phillips v. Phillips*, 245

ADVANCING CAUSE.—SEE PRACTICE.

AFFIDAVIT.

OF PLAINTIFF'S CLAIM.

1. *Insufficiency.*—An affidavit of plaintiff's claim, "that there is due to the plaintiff after allowing all just deductions and set-offs, \$584.62, with interest from December 28, 1877," does not state the amount due, nor such facts as furnish the basis for a calculation of the amount due, and is insufficient. *Gottfreid v. German Nat. Bank*, 224

AGENCY.

DECLARATION OF AGENT.

1. *Made in the course of employment.*—Where an agent, employed in negotiating the sale of a promissory note, makes statements regarding the purpose for which the same was executed, the making of such statements will be considered fairly within the scope of his agency, and will bind his principal; the general power to negotiate will by implication include the power to give such information as would ordinarily be called for. *McBean v. Fox et al.*, 177

RATIFICATION.

2. *Acting with full knowledge.* Before a person can be held to have ratified, by his conduct, the voluntary act of another, done for his benefit, it must appear that he acted with full knowledge of all the material facts and circumstances connected with the assumed agency. *Stein v. Kendall*, 103

3. *By silence.*—While the mere silence of a principal may, under some circumstances, be deemed a ratification of the acts of a pretended agent, yet a mere failure to disavow such acts *instantly* upon being

AGENCY.

RATIFICATION. *Continued.*

apprised of them, will not *ipso facto* be a ratification. *Miller v. Excelsior Stone Co.*, 273

AMENDMENTS.

PLEADINGS.

1. *Declaration—Right to re-plead.*—Where a plaintiff has been allowed to amend his declaration so as to materially change the issues formed, it is error to refuse the defendant leave to file additional pleas to meet such issues. *Nelson et al. v. Akeson*, 165

2. *Leave to amend not discretionary.*—Leave to amend pleadings necessary to present an issue is the legal right of a party, and is no longer discretionary with the court. *Empire Fire Ins. Co. v. Real Estate Trust Co.*, 391

OF JUDGMENT.

3. *Notice should be given.*—While courts have authority over their records to correct clerical errors, and if done at the time at which the judgment was entered, without notice, it is error to allow an amendment, even in matters of form, at a subsequent term without notice, and an amendment so made is a nullity. *Rauh v. Ritchie*, 188

APPEAL.

BOND.

1. *Suit on—Variance.*—In a suit on an appeal bond, the plaintiff must describe the judgment appealed from so as to distinguish it from others. An allegation of a judgment against two is not supported by proof of a judgment against one. *Dupue v. McCausland*, 395

FROM JUSTICE OF THE PEACE.

2. *When summons need not issue to defendant.*—A defendant against whom no judgment was rendered before the justice, need not be summoned to appear in circuit court as a party defendant, on an appeal by a co-defendant. *Fabbri v. Cunio*, 240

IN CHANCERY.

3. *Granted at subsequent term.*—Where an appeal was prayed at the same term at which the decree purports to have been rendered, though in fact the decree was subsequently signed in vacation, and the prayer for appeal remained undisposed of until the November term following, the Court had the power to make an order allowing the appeal at the latter term. *Augustine et al. v. Doud*, 588

ATTORNEYS.

FEES.

1. *Allowance for fees of, in foreclosure.*—No allowance for attorney's fees can be made in a decree of foreclosure, even upon default, unless claim is made therefor in the bill of complaint, although the mortgage contained a provision for payment of attorney's fees in case of foreclosure. *Augustine et al. v. Doud*, 588

2. *Recovery for, on dissolution of injunction.*—In a suit for damages on an injunction bond, to recover for attorney's fees in the original

ATTORNEYS.

FEES. • *Continued.*

injunction suit, proof should be made that the plaintiff had paid or become liable to pay his attorneys a definite sum for their services. *Rees et al. v. Peltzer et al.*, 315

PRIVILEGED COMMUNICATIONS.

3. *To one not licensed.*—Communications made by a party to a suit before a justice of the peace, to a person who is not a licensed attorney, with a view to such person trying the cause before the justice, are not privileged. *McLaughlin v. Gilmore*, 563

BANKS AND BANKING.

ACTION IN CORPORATE NAME.

1. *To recover tax illegally collected.*—A bank may maintain an action in its corporate name to recover back a tax illegally assessed and collected against its shares of capital stock, though such stock stands in the names of different individual shareholders. The payment of the illegal portion of the tax being one for which the shareholders were not responsible. *Kimball v. Corn Exchange Nat. Bank*, 209

BANKRUPTCY.

NEW PROMISE.

1. *Partial payment as evidence of new promise.*—Evidence that the maker of a note paid to the holder \$100, as an accommodation, an act of friendship, with no intention of having it applied as partial payment on the original note, is not sufficient to show a promise to revive a right of action once barred by a discharge in bankruptcy. *Pease v. Catlin*, 88

BASTARDY.

1. *Prosecution is a civil proceeding.*—A prosecution for bastardy is a civil proceeding, and susceptible of a settlement by the parties, and a receipt given in settlement is *prima facie* evidence of full settlement, so that the burden of asserting the contrary is upon the party seeking to impeach the receipt. *McElhaney v. The People*, 550

BILLS OF EXCHANGE.—See PROMISSORY NOTES.

ESSENTIAL QUALITIES.

1. *How should be made.*—A bill of exchange must be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and it should be for the payment of money only, and not for the performance of any other act or in the alternative. *Miller v. Excelsior Stone Co.*, 273

2. *When payable upon a contingency.*—An instrument drawn for the payment of six hundred dollars, as follows: "Two hundred dollars out of the first estimate or when the first floor joists are in, two hundred dollars when the building is ready for the roof, and two hundred dollars when the stoops are completed, and charge the same to my account," is not a bill of exchange because payable upon a contingency, and out of a particular fund. *Miller v. Excelsior Stone Co.*, 273

3. *Character not changed by happening of contingency.*—Where the payment depends upon a contingency, the happening of the event will

BILLS OF EXCHANGE.

ESSENTIAL QUALITIES. Continued.

not change the character of the instrument. It was not a bill of exchange when made, and would not become such by matter *ex post facto*. *Miller v. Excelsior Stone Co.*, 273

BONDS.

APPEAL.

1. *Suit on—Bankruptcy of obligor.*—In a suit against two defendants upon a bond, where one defendant pleads his bankruptcy, it is the proper practice to proceed with the suit against all to final judgment, and then order a stay of execution against the bankrupt until the question of his discharge is settled, but a plaintiff may discontinue as to the bankrupt and proceed to judgment against the other. *Smith v. Lozano et al.*, 171

2. *Estoppel by recitals.*—Where a bond for appeal to Supreme Court recited the recovery of a judgment in the Court below, and covenanted for its payment upon affirmance, the obligors are estopped by such recitals to deny the existence of a valid, unsatisfied judgment. *Smith v. Lozano et al.*, 171

3. *Variance.*—In a suit on an appeal bond, the plaintiff must describe the judgment appealed from so as to distinguish it from others. An allegation of a judgment against two is not supported by proof of a judgment against one. *Dupuis v. McCausland*, 395

BAIL BOND.

3. *In what sum to be taken.*—A bond, although taken in a sum less than the statute requires, may still be held to be a valid bond, at least at common law. The provisions of the statute requiring the sheriff to take a bail bond in double the sum for which bail is required, are directory merely, and a bond taken for a less sum is valid, and may be enforced. *Beveridge v. Chetlain*, 231

BY SCHOOL DIRECTORS.

4. *Power to issue bonds.*—The right of school directors to issue bonds of their district is made dependent upon a vote of the people of the district. *Bolton v. Board of Education*, 193

5. *Vote determined by the directors*—The question whether there has been a vote in favor of issuing bonds, is left by the Legislature to be determined by the directors, two of whom are required to act as judges and one as clerk of the election, and their determination of the question is final as to all *bona fide* purchasers for value of such bonds. *Bolton v. Board of Education*, 193

6. *Recitals in bonds—Estoppel.*—Where bonds issued by school directors contain recitals that they were issued by virtue of a vote of the district had according to law, the district is estopped to deny that such vote had been taken, the bonds being in the hands of a *bona fide* holder. *Bolton v. Board of Education*, 193

BROKER.

COMMISSIONS.

1. *On sale of real estate are due when.*—The commissions of a broker for the sale of real estate are due when he has found a purchaser who

BROKER**COMMISSIONS. Continued.**

- buys the property. *Lawrence et al. v. Atwood*, 217
2. *Change in terms of sale.*—The broker's right to commissions is not affected by a modification or change of the terms of payment made between the buyer and seller, different from the terms first given by the seller to the broker. *Lawrence et al. v. Atwood*, 217

CARE.—See NEGLIGENCE.**DUE CARE.**

1. *Burden of proof.*—In an action against a municipal corporation for damages arising from its negligence, the burden of proof is upon the plaintiff to show that he was exercising due care at the time of the injury. *City of Mendota v. Fay*, 418
2. *No presumption of.*—The question whether the plaintiff, at the time of the injury, was exercising due care, is for the jury to determine from the evidence, the law presuming nothing in that regard. *City of Mendota v. Fay*, 418
3. *Definition of.*—Due care is that degree of care that a reasonable and prudent person would exercise under all the circumstances of the case. *City of Mendota v. Fay*, 418
4. *Proof of.*—It must appear affirmatively as a fact in the case, in some manner, that the plaintiff was exercising due care, and if from all the circumstances in the case it thus appears, it will be sufficient; otherwise, independent proof upon that point must be made. *City of Mendota v. Fay*, 418

CHANCERY.**JURISDICTION.**

1. *Not to restrain collector from paying over tax illegally collected.*—A bill in equity will not lie to restrain a collector of taxes from paying over, according to his warrant, a tax collected under an illegal assessment, there being a complete remedy at law to recover it back. *Kimball v. Corn Exchange Nat. Bank*, 209
2. *To restrain public officers.*—In the absence of fraud, a court of equity has no jurisdiction to restrain a Board of County Commissioners from consummating the settlement of a disputed claim against the county. *Harms v. Fitzgerald*, 325
3. *In cases of fraud.*—Where a bill, in the nature of a creditor's bill, is filed to set aside a fraudulent conveyance, a court of chancery obtains jurisdiction on the ground of fraud as against all parties chargeable with the fraud, and in such cases it will wrest the property so fraudulently conveyed, and hand it over to the creditors to whom it rightfully belongs. *Philadelphia Fire Ins. Co. v. Central Nat. Bank*, 344
4. *As to parties not charged with fraud.*—Where no fraud is charged as to particular defendants, and no other ground of equitable jurisdiction is alleged beyond a mere allegation of possession of assets, and the answer traverses such allegation, the bill cannot be maintained. *Philadelphia Fire Ins. Co. v. Central Nat. Bank*, 344
5. *Cases where chancery has not jurisdiction.*—Where, in a creditor's

CHANCERY.

JURISDICTION. *Continued.*

bill, it is sought to charge certain insurance companies with indebtedness for losses, under policies issued by them, and the answers deny such indebtedness, a court of chancery has no jurisdiction to try the issue thus made, but may order the assignment of the policies to a receiver, and clothe him with authority to bring suits at law upon the policies. *Philadelphia Fire Ins. Co. v. Central Nat. Bank,* 344

PLEADING—OF THE BILL.

6. *Allegations in bill.*—Where a bill alleged that the husband of one of the defendants acted as the agent of complainant's intestate, and that he had received funds belonging to the intestate, which his wife, defendant, had fraudulently received from him; and also contained charges of fraud and undue influence in obtaining such funds, the allegations are sufficient, and a demurrer to the bill was improperly sustained. *Sturgeon, Adm'r, v. Burrall et al.,* 537

7. *Must be supported by proof.*—Where the court finds that the preponderance of the evidence is against the allegations of the bill, it will be dismissed. *Stilson, impl'd, v. Harger et al.,* 584

8. *Prayer for injunction.*—Must be in the prayer for process as well as in the prayer for relief. *Willett et al. v. Woodhams et al.,* 411

9. *Multifariousness.*—Mere surplusage does not make a bill in chancery multifarious or otherwise bad on demurrer. *Sturgeon, Adm'r, v. Burrall et al.,* 537

APPEAL IN.

7. *Granted at subsequent term.*—Where an appeal was prayed at the same term at which the decree purports to have been rendered, though in fact the decree was subsequently signed in vacation, and the prayer for appeal remained undisposed of until the November term following, the court had the power to make an order allowing the appeal at the latter term. *Augustine et al. v. Doud,* 588

CHATTEL MORTGAGE.

WHEN TITLE VESTS.

1. *After condition broken.*—The title to the property conveyed by chattel mortgage becomes vested in the mortgagee on condition broken. *Jefferson v. Barkto,* 568

SALE.

2. *Irregularity in.*—An irregularity in the sale of property covered by a chattel mortgage will not affect the validity of the mortgage or deprive the mortgagee or his assignee, of the right to take possession. *Jefferson v. Barkto,* 568

CITIES.

CITY COUNCIL.

1. *Is judge of election, etc., of its members.*—The common council of the city of Chicago is the judge of the election and qualification of its own members, and their determination cannot be reviewed by mandamus. *Hildreth v. Heath et al.,* 82

CITIES.

CITY COUNCIL. *Continued.*

2. *Disqualification of officer by conviction of crime.*—That section of the charter of the city of Chicago which provides that no person shall be eligible to the office of alderman if he shall have been convicted of malfeasance, bribery, or other crimes, should be limited to convictions under the laws of the State of Illinois. Conviction in the United States courts of an offense created by act of Congress, does not constitute a disqualification under such charter. *Hildreth v. Heath et al.*, 82

POWERS.

3. *To contract debts—Chicago certificates of 1877.*—The certificates of 1877 were in terms drawn upon and payable out of a special fund and in no other way, and the parties receiving them did so discharging the city from all liability on account of the claim for which they were given, taking alone their chances to collect the same from such special fund; this being the case, it is but a giving one thing for another, and is not an increasing of the city indebtedness. The issue of such certificates is not in conflict with the Constitution. *Fuller v. Heath et al.*, 118

4. *The certificates of 1875.*—Although the certificates of 1875 were not by their terms drawn upon any special fund, they were issued as a means of meeting the current expenses of the city for the year 1875, and were drawn after the appropriation and levy of the tax out of which it is now proposed to pay them was actually made, it would not be inequitable for the city authorities to retire them, giving in substitution therefor, other certificates drawn against the special fund designed for their payment, and to anticipate which they were issued, which would stand on the same footing as the certificates of 1877. The holders of these certificates have an equitable claim to be paid out of the tax levy of that year. *Fuller v. Heath et al.*, 118

SIDEWALKS.

5. *Care in constructing.*—Cities are not insurers against accidents, nor are they required to so construct their sidewalks as to secure immunity from injury when used, but they fulfill their duty to the public in that regard when such walks are reasonably safe for persons exercising ordinary care and caution when using them. *City of El Paso et al. v. Causey*, 531

6. *Permitting stairways in streets—Negligence.*—In considering the degree of negligence properly attributable to a city in allowing the construction of stairways as entrances to basements from the street, it is not to be judged of from the fact of one injury, but rather what would have been the course of prudent persons prior to the accident; would it be considered that the sidewalk was unsafe by reason of such entrance? *City of El Paso v. Causey*, 531

DRAWBRIDGES.

7. *Construction of barriers.*—In the management of drawbridges, a city is not bound to so construct them as to render accidents impossible, but only to exercise such a degree of care, prudence and judgment as prudent and careful men may be expected to exercise in view of the dangers involved. The character of safeguards around such bridges

CITIES.

DRAWBRIDGES. *Continued.*

must necessarily be left to the judgment and discretion of the proper city officers, and it is only when they have failed to exercise reasonable care and prudence in that regard that the city can be held liable. *City of Chicago v. Gavin*, 302

COMMISSIONS.

OF BROKER.—See BROKER.

OF COLLECTOR.—See TAXATION.

CONTRACTS.

BY PAROL.

1. *Payment to be made in land—Statute of Frauds.*—A party who, under a parol contract, has rendered services in payment for land, cannot repudiate or annul the contract on the ground that it is within the Statute of Frauds, and recover the value of his services, there being no default of the other contracting party. *Mitchell v. McNab*, 297

IMPLIED.

2. *Refusal of one party to perform.*—Where one through his own act or neglect cannot, or availing himself of the Statute of Frauds, will not, perform an express agreement for which he has received a consideration, the law will imply one that will bind him, at least to return the consideration received. *Mitchell v. McNab*, 297

VOIDABLE.

3. *Performance by one party.*—A parol contract for the purchase of lands, although it cannot be enforced against the vendor by reason of the statute of frauds, is yet not void. The party who has performed has put it out of his power to repudiate on his part, and he cannot repudiate it for the other, who might repudiate for himself if he would, but who chooses rather to perform. *Mitchell v. McNab*, 297

FOR WORK AND LABOR.

4. *Discharge before expiration of term—Evidence in justification.*—An employer, in excuse for discharging a servant before the expiration of his term of service, offered to prove indecent conduct on the part of the servant towards a maid servant, and that the servant shirked his work, and made unwarranted complaint of the quality of the food. *Held*, the testimony offered was competent and should have been submitted to the jury. *Weaver v. Halsey*, 558

OFFER AND ACCEPTANCE.

5. *What is necessary.*—An acceptance, to be good, must in every respect meet and correspond with the offer made; neither falling within nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them as they stand. *Fox v. Turner*, 153

6. *Proposal to accept on different terms.*—A proposal to accept an offer on terms varying from those proposed amounts to a rejection of the offer, and a substitution of a counter proposition, which cannot become a contract until assented to by the first proposer. The original offer loses its vitality, and is no longer pending between the parties, and becomes

CONTRACTS.

OFFER AND ACCEPTANCE. *Continued.*

an open proposition again only when renewed by the party who first made it. *Fox v. Turner*, 153

7. *Withdrawing counter proposition.*—The party submitting a counter proposition, cannot, without the consent of the first proposer, withdraw or abandon the same, and then accept the original offer which he has once rejected. *Fox v. Turner*, 153

PROOF OF EXPRESS PROMISE REQUIRED.

8. *Voluntary labor in aid of public enterprise.*—An architect, at the request of a committee of citizens, prepared plans for a contemplated building to be erected in his village. He was informed at the time that his labor would be considered a voluntary contribution to an enterprise in which all were equally interested. *Held*, in a suit against one of such committee for payment for such plans, an express promise by him to pay for the work done must be proved, or no recovery could be had. *Dunton v. Chamberlain*, 361

SUBSCRIPTION TO RAILROAD.

9. *Delivery in escrow.*—A subscriber to the capital stock of a railroad corporation delivered the same to a director of the company, in escrow, not to be delivered to the company except on the happening of certain contingencies. *Held*, that in the absence of proof of the happening of such contingencies there was no delivery to the company, and no recovery could be had. *O. O. & F. R. V. R. R. Co. v. Hall*, 612

10. *Delivery to a director of the corporation.*—A delivery of such subscription to a person, though a director of the company, if upon condition that no delivery should be made to the corporation until it had performed certain conditions, is not a delivery to the corporation, and it acquired no right to the subscription until the performance of the conditions, no matter how it got possession thereof. *O. O. & F. R. V. R. R. Co. v. Hall*, 612

11. *Proof of delivery on conditions.*—It is competent to show by parol that a written agreement was delivered to take effect only upon certain conditions. Such proof is not admitted for the purpose of changing the terms of a written contract, but to determine whether in fact it ever had an existence as a contract. *O. O. & F. R. V. R. R. Co. v. Hall*, 612

RESCISSION.

12. *When cannot be made.*—Where it appears that the vendor, under a contract to sell real estate, is not at fault, the vendee cannot rescind, and recover back the money paid thereon, unless he first place himself in a position to demand of the vendor a compliance with the terms of the contract on his part, and the vendor refuses. *Davison et al. v. Hill*, 70

BY MARRIED WOMEN.

13. *Disability to contract removed—Burden of proof.* The acts of 1861 and 1869, by implication, empowered a married woman to make contracts relating to her separate property, but her power at law to make binding agreements was still exceptional, more like that of an infant. The presumption was still against her legal capacity, and it was incumbent upon a person seeking to charge her upon such a contract, to show affirmatively that it related to her separate property, acquired in one of

CONTRACTS.

BY MARRIED WOMEN. *Continued.*

the ways mentioned in the statute, and was within the exception which gave her capacity. *Garland v. Pecney*, 108

CORPORATIONS.

LIABILITY OF STOCKHOLDER.

1. *On unpaid stock—Manner of proceeding.*—A creditor of a corporation may bring suit in any of the usual forms of action for an indebtedness due him from a corporation, and upon suing out a summons may at the same time sue out a garnishee summons against any of the stockholders whose subscription to the capital stock is wholly or in part unpaid, and when a recovery is had, the garnishee may be compelled to respond to the judgment creditor instead of paying his indebtedness to the corporation. *Pease v. Underwriters' Union*, 287

2. *Proceeding under the Statute.*—If the cause is commenced and conducted under the statute, the whole proceeding will constitute but one case, and upon the trial of the issues formed upon the answers of the garnishees, the court will take judicial notice of the judgment against the principal debtor. *Pease v. Underwriters' Union*, 287

3. *Proceeding under Garnishment Act.*—Where the creditor having obtained a judgment against the corporation, seeks to enforce the liability of the stockholder by a subsequent independent proceeding in garnishment, proof of the judgment obtained against the corporation must be made. *Pease v. Underwriters' Union*, 287

4. *Proof of liability.*—Where the garnishees have answered, denying that they were stockholders, the burden of proof is upon the plaintiff to show that they were stockholders. *Pease v. Underwriters' Union*, 287

5. *Certified copies of articles of incorporation as evidence.*—For the purpose of overcoming the denial of the garnishees that they ever subscribed to the capital stock, a certified copy of articles of incorporation wherein the names of the garnishees appear as subscribers, is incompetent evidence, without showing in some way that they were parties to the original articles of incorporation. *Pease v. Underwriters' Union*, 287

6. *Limit of liability.*—The liability of the stockholder is limited by the amount of his subscription unpaid at the time of the service of the garnishee summons, and such liability is individual, not joint. The statute does not intend a joint liability as partners. *Pease v. Underwriters' Union*, 287

CORPORATE PURPOSE.

7. *Employment of attorneys.*—Services of attorneys in proceedings to wind up the affairs of a corporation are for a corporate purpose, and should be paid for out of the corporate funds. *McCoy et al. v. Appleby Man'f'g Co.*, 78

FOREIGN.

8. *Jurisdiction over in this State.*—A corporation organized in another State, may by comity or consent remove its officers, agents, and effects into this State, and here exercise its corporate franchises; when it has

CORPORATIONS.

FOREIGN. *Continued.*

done so, its "residence" for the purposes of jurisdiction is in this State.

Pennsylvania Co. v. Sloan, 364

9. *May plead the Statute of Limitations.*—The statute provides for service of process upon foreign corporations, and the ability to make such service is the test of the running of the Statute of Limitations.

Pennsylvania Co. v. Sloan, 364

COSTS.

WHEN ALLOWED.

1. *For witnesses not examined.*—Costs as witness fees for witnesses not examined may be allowed. *Smith v. Kinkaid,* 620

COUNTY COMMISSIONERS.

POWER TO ADJUST CLAIMS.

1. *May settle claims against county.*—The board of county commissioners of a county have power to settle and adjust claims against the county, and when in the exercise of their discretion they have settled and compromised a claim about which there was dispute, a court of equity has no jurisdiction to order an injunction restraining the consummation of such settlement, in the absence of any proof of fraud or corruption on the part of the board. *Harms v. Fitzgerald,* 325

CREDITOR'S BILL.

OFFICE OF.

1. *Denial of assets.*—Although a creditor's bill, under the statute, is a bill for relief as well as discovery, the relief is dependent upon the discovery; and when the answer fails to discover assets of the judgment creditor in the hands of the defendant, but denies the allegations in the bill, relief cannot be granted. In the absence of fraud, a court of chancery has no power to try the issue thus made and grant relief in case the defendant is proved to be in possession of assets. *Philadelphia Fire Ins. Co. et al. v. Central Nat. Bank et al.,* 344

DEEDS.

ACKNOWLEDGMENT.

1. *Waiver of homestead.*—The homestead right of the wife must appear to have been expressly released by her in the body of the deed, as well as in the certificate of acknowledgment. *Ayres v. Hawks et al.,* 600

DISTRESS FOR RENT.

1. *Death of tenant pendente lite—Action survives.*—A proceeding against a tenant for the collection of rent, whether it be by the common law actions of covenant, debt or assumpsit, or by distress, survives upon the death of the tenant, and may be prosecuted against his executor or administrator. *Rauh, Ex., v. Ritchie, Ex'r,* 188

2. *Where property has been released by bond.*—Where property, siezed under a distress warrant, has been released by bond under the statute, the landlord's specific lien upon it is at an end, and it is no longer liable to a special execution. *Rauh, Ex., v. Ritchie, Exr.,* 188

DIVORCE.

1. *Adultery—Condonation.*—Condonation of adulterous acts will not be inferred from the fact of subsequent cohabitation where it appears that at the time of such cohabitation the fact of adultery was not known. *Phillips v. Phillips*, 245
2. *Condonation of cruelty.*—The offenses of adultery and cruelty are essentially different, and the same circumstances, as respects condonation, cannot be equally applicable to both, and cohabitation after acts of extreme cruelty is not a bar to a divorce for that cause. *Phillips v. Phillips*, 245

DRAM SHOPS.

SALE OF LIQUORS.

1. *When license not required.*—Under the dram shop law the prohibition of sale of certain specified liquors without license must be held to be an exclusion of all others not enumerated, and no license is required for the sale of those not enumerated. *Feldman v. City of Morrison*, 460

CIDER.

2. *Proof of intoxicating qualities.*—Cider not being one of the liquors specially named in the prohibition of the dram shop act, proof must be made that it is intoxicating, in a prosecution for selling cider as an intoxicating liquor. *Feldman v. City of Morrison*, 460

DURESS.

1. *What constitutes payment of tax under.*—The payment of a tax levied under an illegal assessment, while the warrant is in the hands of the collector, and to avoid a threatened levy and sale, is payment made under duress. *Kimball v. Corn Exchange Nat. Bank*, 209

ESTOPPEL.

PROOF OF CLAIM IN BANKRUPTCY.

1. *Is no bar to action for deceit.*—In an action for deceit in the sale of property, the fact that the plaintiff had proved his claim for the money paid, in bankruptcy against the defendant, and received a dividend thereon, is no bar to an action for deceit in making the sale. *McBean v. Fox et al.*, 177
2. *Estoppel by recitals.*—Where a bond for appeal to Supreme Court recited the recovery of a judgment in the court below, and covenanted for its payment upon affirmance, the obligors are estopped by such recitals to deny the existence of a valid, unsatisfied judgment. *Smith v. Lozano et al.*, 171
3. *Recitals in bonds—Estoppel.*—Where bonds issued by school directors contain recitals that they were issued by virtue of a vote of the district had according to law, the district is estopped to deny that such vote had been taken, the bonds being in the hands of a *bona fide* holder. *Bolton v. Board of Education*, 193

EVIDENCE.

DECLARATIONS.

1. *Respecting contemporaneous acts.*—Declarations of a person soliciting subscriptions for a railroad, relating to subscriptions other than the

EVIDENCE.

DECLARATIONS. *Continued.*

one in suit, are admissible without specifically designating to which one reference was made, where it appears that all the subscriptions were contained in a book with the one in suit, and all made at the same time, and sufficiently identical to be considered as a class of instruments. *O.*

O. & F. R. V. R. R. Co. v. Hall,

612

BURDEN OF PROOF.

2. *Payment.*—Where payment is set up as a defense to an action for the recovery of money, the burden of proof is on the party alleging payment, to establish that fact by a fair preponderance of evidence. *Johnson v. Breaton,*

293

3. *As to contracts by married women.*—A person seeking to charge a married woman on a contract made by her, must show affirmatively that it related to her separate property, acquired in some of the methods mentioned in the statute. *Garland et al. v. Peeney, use, etc.,*

108

4. *Where party furnishes necessities to an infant.*—The burden of proof is upon the party furnishing necessities to an infant, to show either an express promise of the parent to pay therefor, or such circumstances bearing upon the parent's neglect, and his evident purposes regarding the necessities of the child, as that a promise can properly be inferred therefrom. *Clark v. Gotts,*

454

5. *Exercise of due care by person claiming for an injury.*—In an action against a city for negligence in construction of its sidewalks, by a person injured on account of a defect therein, the burden of proof is upon the plaintiff to show not only that the city was negligent, but that at the time of the injury, he was in the exercise of due care for his personal safety. *City of El Paso v. Causey,*

531

6. *Receipt prima facie evidence.*—A receipt expressing to be in full settlement is *prima facie* evidence of that fact so that the burden of asserting the contrary is upon the party seeking to impeach it. *McElhaney v. The People,*

550

7. *Proof of liability.*—Where the garnishees have answered, denying that they were stockholders, the burden of proof is upon the plaintiff to show that they were stockholders. *Pease v. Underwriters' Union,*

287

CROSS-EXAMINATION.

8. *Where party is witness.*—Where the witness is a party in interest, greater latitude is allowed on cross-examination than where the witness is wholly free from interest. *O. O. & F. R. V. R. R. Co. v. McMath,*

429

PREPONDERANCE.

9. *To be judged of by the jury.*—It does not necessarily follow that the testimony of two witnesses should outweigh that of one. The weight of testimony is for the jury, and while they may not arbitrarily disregard the testimony of an unimpeached witness, yet they are to consider it in connection with all the circumstances, and give it such weight as it is entitled to. *Clark v. Gotts,*

454

10. *Weight of.*—In prosecutions for bastardy where the prosecutrix swears positively to the paternity of the child, and the defendant as positively denies it, if the parties stood upon a perfect equality, in

EVIDENCE.

PREPONDERANCE. *Continued.*

every respect, there would be no preponderance of evidence, but it must be conceded that for many reasons the testimony of one witness is entitled to more weight than that of the other, and under such circumstances the court cannot say that the jury were not authorized in finding in favor of the prosecutrix. *McElhaney v. The People*, 550

PAROL.

11. *Admissible to prove delivery on condition.*—It is competent to show by parol that a written contract was delivered to take effect upon certain conditions only. It is not admitted for the purpose of changing the terms of a written contract, but to determine whether in fact it ever had an existence as a contract. *O. O. & F. R. V. R. R. Co. v. Hall*, 612

COMPETENCY.

12. *Promptness in payment of debts.*—In a suit for the payment of an alleged debt, evidence that the party was always prompt in the payment of his debts is admissible, as a circumstance tending to raise a presumption of payment of the debt in suit. *Orr v. Jason, Adm'x*, 439

13. *Of other proceedings in court.*—Evidence of other proceedings in court by the plaintiff (to establish the claim under a nuncupative will), relative to the same subject-matter, is admissible, as a circumstance tending to show the intention of the plaintiff and the debtor, as to whether there had been a liquidation of the claim and a promise to pay. *Orr v. Jason, Adm'x*, 439

14. *Competency of witness.*—In an action by a wife for damages sustained in consequence of intoxication of her husband, caused by the sale of liquor to him, the husband is a competent witness in behalf his wife. *Noy v. Creed*, 557

WHEN INCOMPETENT.

15. *Statements of third party, made without authority.*—The only evidence to prove the contract relied on by defendant, was the testimony of defendant herself of statements by a third person that plaintiff would collect the claims at a certain rate per cent. It was not shown that the plaintiff had knowledge of or consented to the making of such statements. The evidence was held incompetent to establish the contract relied on. *Stein v. Kendall*, 103

16. *Proof of conduct in other transactions.*—The fact that a person on one or more occasions receives payment of a debt without surrendering the evidence of indebtedness, is not admissible as tending to show that other notes still remaining in his possession have been paid or discharged by the maker. *Kent, Adm'r, v. Mason, Ex'r*, 466

17. *General good character.*—In actions for fraud or deceit in the sale of property, evidence of general business integrity is not admissible to repel the presumption of fraud. *McBean v. Fox et al.*, 177

18. *Certified copies of articles of incorporation as evidence.*—For the purpose of overcoming the denial of the garnishees that they ever subscribed to the capital stock, a certified copy of articles of incorporation wherein the names of the garnishees appear as subscribers, is incompetent evidence, without showing in some way that they were parties to the original articles of incorporation. *Pease v. Underwriters' Union*, 287

EVIDENCE. *Continued.*

IMPEACHMENT OF WITNESS.

19. *General reputation of witness.*—General reputation of a witness for truth and veracity, at a former period and in another neighborhood from that where he gave his testimony, may or may not tend to prove that issue, according to the remoteness of the time and place and other circumstances. *Brown v. Luehrs*, 74

SECONDARY.

20. *Proving deed by copy of record.*—Before a party is entitled to read in evidence the record of a deed, it is incumbent upon him to show by proper proof that the original deed is lost, or not in his power to produce in court, and that to the best of his knowledge it was not intentionally destroyed or disposed of for the purpose of introducing a copy thereof as evidence. *Fabbri v. Cunio*, 240

21. *Insufficient proof of copy.*—Plaintiff testified that the original lease was destroyed by fire, and produced a paper which he testified was "a substantial copy," and that he was positive it was correct as to parties and the rent. *Held*, it was not sufficiently shown to be a copy, the proof upon that point being too uncertain and involving matter of opinion as to what was of the substance of the lease. *Dupue et al. v. McCausland*, 395

REFERENCE TO MEMORANDUM.

22. *Witness may refer to when.*—A witness may refer to a memorandum made by himself, to refresh his memory, but the memorandum itself is not admissible in evidence except in cases where the witness at the time of testifying, has no recollection of what took place further than that he accurately reduced the whole transaction to writing. *Kent, Adm'r, v. Mason, Ex'r*, 466

OBJECTIONS TO DEPOSITION.

23. *As to matter of substance.*—Objections to matter of substance in depositions should be made and disposed of before the commencement of the trial. *Kent, Adm'r, v. Mason, Ex'r*, 466

STATUTES OF ANOTHER STATE.

24. *Showing incorporation of Chamber of Commerce.*—The admission as evidence of a statute of Wisconsin incorporating the Chamber of Commerce of Milwaukee, and of certain proceedings before the board of arbitrators of such corporation, in respect to the subject matter involved in this suit was held error. *Kelderhouse v. Saveland*, 65

GENERALLY.

25. *Declarations of agent.*—The general power of a broker employed to negotiate the sale of a promissory note includes, by implication, the power to give such information in regard to the note, as would ordinarily be called for, and his representations so made will bind his principal. *McBean v. Fox, et al.* 177

26. *When consideration should be proved.*—Where it is expressly declared to be a conveyance of property for certain stated purposes, in consideration of certain indebtedness of the grantor to the grantee, such consideration becomes material to be shown, and a variance in this respect between the declaration and the proof is fatal. *Lill et al., Ex'rs. v. Brant, Adm'r*, 266

EVIDENCE.

GENERALLY. *Continued.*

27. *Supporting a plea of justification.*—Evidence in support of such a plea, of whatever amount and weight, necessarily raises a question of preponderance, and in no such case can the court direct a non-suit or a finding for either party absolutely. *Gault v. Babbitt*, 130

28. *Conflicting testimony should be submitted to jury.*—Where evidence was introduced, tending to show that the brick in question, for which payment was claimed, were thrown in as part consideration in the purchase of land, the question as to whether, in fact, they were so included should have been submitted to the jury. *Heath et al. v. Jones*, 256

29. *Proof that judgment was affirmed in Supreme Court.*—In a suit upon a bond for appeal to Supreme Court, where, by the state of the pleadings, the only issue left to be tried was *non est factum*, an averment in the declaration that the judgment below was affirmed in Supreme Court, not being traversed, is admitted, and no proof of such affirmance is necessary. *Smith v. Lozano et al.*, 171

30. *Offer to prove non-payment.*—The defendant testified to the fact of payment, which the plaintiff denied, and offered to produce a witness to show that the defendant did not settle and pay as he had testified. The testimony offered was competent, and should have been admitted. *Johnson v. Breaton*, 293

31. *Tending to show want of negligence.*—In an action against an employer for the death of one of his workmen, caused by the explosion of a steam boiler, evidence that the explosion occasioned a loss to the employer of \$20,000 is not admissible as tending to show that there was no negligence on the part of the employer in providing safe machinery. *Morris v. Gleason*, 510

32. *Expelling passenger from train—Evidence in mitigation.*—In an action for damages for the expulsion of a passenger from a railroad train, the defendant offered to prove, in explanation of the reason why the brakeman was armed with a "billy" with which he struck the plaintiff, that on a previous occasion the train had been boarded at the same place by confidence men and roughs who had attacked the brakeman. *Held*, that the evidence should have been admitted in mitigation of the plaintiff's claim for exemplary damages. *C. B. & Q. R. R. Co. v. Boger*, 472

33. *Falsus in uno, falsus in omnibus.*—This maxim should be applied only in cases where a witness *willfully* and *knowingly* gives false testimony. *C. B. & Q. R. R. Co. v. Boger*, 472

34. *Value of attorney's fees.*—In a suit on an injunction bond, the plaintiffs introduced the testimony of several members of the bar as to what the services of plaintiff's attorneys in the injunction suit were reasonably worth, but there was no proof that the plaintiffs had paid their attorneys, or become liable to pay any sum, or had agreed to pay what their services were reasonably worth. The testimony was insufficient to support a verdict of the jury for a certain sum as attorney's fees. *Rees et al. v. Peltzer et al.*, 315

EXCEPTIONS, AND BILLS OF EXCEPTION.

OF THE BILL.

1. *Presumption as to filing in time.*—It will be presumed that the judge would not have signed a bill of exceptions unless it was presented to him in proper time, and whatever delay may have intervened after it was signed and before it was filed, will be presumed to have been occasioned by the pressure of other engagements on the part of the judge, or his failure to deliver it for filing, and not to any neglect on the part of the appellant. The burden of proving such neglect, if any, is upon appellee.

Stein v. Kendall,

101

2. *Signing in vacation.*—It is immaterial whether at the time the order to file the bill *nunc pro tunc* was made, the court was in session or not; the presumption is that it was presented to the judge within the thirty days, and that for reasons for which he alone is responsible it was not actually filed until after the thirty days had expired. *Stein v. Kendall,*

101

3. *Defective.*—A bill of exceptions signed by the judge, with delegated authority to a reporter to write out his notes, and to the clerk to admit them when written out, to be placed among the files and inserted in the record in the shape of skeleton notes, with a skeleton bill of exceptions, will not be tolerated. It amounts to nothing more than a statement that there was evidence, presumably enough. *Hayward et al. v. Catton,*

577

4. *Must contain all the evidence.*—A bill of exceptions must state that it contains all the evidence in the case, or it will be presumed that there was sufficient evidence to sustain the finding. *Noy v. Creed,*

557

5. *General exception.*—A general exception to a series of instructions is like a general demurrer to a declaration, if there are some good instructions the exception cannot be noticed. *Hayward et al. v. Catton,*

577

EXECUTION.

OF THE LEVY.

1. *Not always a satisfaction.*—A levy upon a sufficient amount of personal property, is not a satisfaction of the judgment, if for some cause not the fault of the officer or the plaintiff, the levy becomes unavailing. *Smith v. Lozano et al.,*

171

GENERAL AND SPECIAL.

2. *Against an executrix.*—It is irregular to award a general execution against an executrix; the judgment should be made payable in due course of administration. *Rauh, Ex., v. Ritchie, Ex'r.,*

188

3. *Where property has been released by bond.*—Where property, siezed under a distress warrant, has been released by bond under the statute, the landlord's specific lien upon it is at an end, and it is no longer liable to a special execution. *Rauh, Ex., v. Ritchie, Ex'r.,*

188

4. *Awarding execution for balance after sale.*—Execution for the balance remaining due after deducting the proceeds of the sale, should be awarded against such defendants only as might be held to pay such balance in an action at law, and in determining such parties the court will be guided solely by the averments in the petition. Resort cannot be had to proof taken before the Master. *Race et al. v. Sullivan,*

94

FRAUD AND FALSE REPRESENTATIONS.

FRAUD.

1. *Fraud implied from the fact.*—If a party makes representations which he knows to be false and which are calculated to induce another to act upon them, and thereby occasions an injury, the law implies fraud, and it is not incumbent upon the plaintiff to prove a fraudulent motive. *McBean v. Fox*, 177

2. *Evidence of general good character in action for fraud.*—In actions for fraud and deceit, evidence of general business integrity is not admissible to repel the presumption of fraud. *McBean v. Fox*, 177

FALSE REPRESENTATIONS.

3. *Motive in making them immaterial.*—In an action for deceit in the sale of personal property, the representations made must be untrue, the party making them must know they were false, and the party to whom they were made must have relied on them as true. But when these facts exist it is immaterial what may have been the actual motive with which the representations were made. *McBean v. Fox et al.*, 177

GARNISHMENT.

CORPORATIONS.

1. *Railroad company not liable to, when.*—A railroad company is not liable to garnishment for cars received of a connecting line, under running arrangements existing between them, such as are usually adopted by connecting lines, whereby instead of unloading and transferring their freight from the cars of one company to the cars of another, each received from the other the cars loaded with freight, and hauled them to the place of destination on its own line of road, and after discharging the freight, returned the cars as soon as practicable in due course of business. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 399

2. *Meaning of "person" in garnishee act.*—While the term "all persons," used in the attachment act is sufficiently broad and comprehensive to charge as garnishees all persons having property or effects of the debtor, yet various considerations of public policy may intervene, in the light of which it is assumed the legislature intended a more restricted application of the statute than the language employed would seem to indicate. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 399

3. *Common carrier exempt.*—A common carrier is bound to serve the public fairly and without unjust discrimination; and in the absence of an express contract, nothing but the act of God or the public enemy can excuse it for non-performance; hence there would seem to be no reason why the same considerations which exempt public officers from garnishment should not be extended to common carriers. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 399

4. *Set-off by garnishee.*—Where the garnishee would have no right, as between itself and the debtor, to apply the property in its possession to the extinguishment of claims against the debtor, it cannot when summoned as garnishee avail itself of the statutory privilege of set-off. The statute does not purport to give any right which it would not have had in case no garnishment writ had been issued. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 399

GARNISHMENT.

CORPORATIONS. *Continued.*

5. *Duty of creditor as respects rights of bondholders.*—The property sought to be reached by garnishee process, had before service of the garnishment writ, been conveyed to certain persons as trustees, to secure different issues of bonds of the road. It does not appear that any of the defendants had any beneficial interest in the property. The railroad company having a mere equity, and the trustees a naked title, and in view of the trusts disclosed by the answer of defendants, it is doubtful if the creditor was entitled to relief, without first resorting to equity to have such trusts ascertained and administered. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.,* 399

GUARANTY.

OF PROMISSORY NOTE.

1. *When liability of guarantor becomes fixed.*—The liability of a guarantor, of a promissory note, which contains a clause that upon failure to pay the interest, the whole sum shall become due at the election of the holder, becomes fixed upon a failure to pay accordingly to the terms of the note, and the election of the holder to declare the whole sum due. *See v. Glover,* 335

HIGHWAY COMMISSIONERS.

FEES OF.

1. *Statute of 1875 not retrospective.*—The statute of 1875 allowing commissions to the treasurer is not retrospective in its operation so as to give him authority to retain commissions for money paid out in 1874. *Town of LaSalle v. Blanchard,* 635

HUSBAND AND WIFE.

GENERALLY.

1. *Wife cannot appropriate earnings of husband as her agent.*—The statute of 1874, relating to the rights of married women, has not enlarged their rights to the extent that a wife can appropriate the results of her husband's labor and skill in a business carried on in her name, so as to prevent his creditors from obtaining the benefit of it, as a means of collecting their debts. *Guill et al. v. Hanny,* 490

2. *Husband as agent.*—If the wife furnished the original capital, and the husband conducted the business, and through his labor and skill contributed largely to increase the capital stock, the additions so made do not become the separate property of the wife so as to be beyond the reach of the husband's creditors. *Guill et al. v. Hanny,* 490

3. *Loan to husband.*—Where the change of the materials originally purchased, produced by the labor and skill of the husband, have become so interwoven with the capital of the wife as to render identification impossible, the wife loses the right to reclaim her property; the transaction, so far as the husband's creditors are concerned, will be regarded as a loan of the wife's money to her husband, by means of which he carries on business. *Guill et al. v. Hanny,* 490

4. *Competency as witness.*—In an action by a wife for damages

HUSBAND AND WIFE.

GENERALLY. *Continued.*

sustained in consequence of intoxication of her husband, caused by the sale of liquor to him, the husband is a competent witness in behalf his wife.

Noy v. Creed, 557

WIFE'S SEPARATE PROPERTY.

5. *When used by the husband.*—When it appears that the husband, if he received any of the wife's separate property, used it in the management of his own affairs and received the increase and profits arising therefrom, it will be considered merely as a loan by the wife to the husband. *Mattingly v. Obley,* 626

INJUNCTION.

DISSOLUTION—ASSESSMENT OF DAMAGES.

1. *Suit on bond.*—The mode of assessing damages on dissolution of an injunction provided by the act of 1861, is not exclusive, so that in case of a failure to have damages so assessed none can be recovered, there is nothing in the language of the statute which in terms takes away the common law remedy upon the bond. *Rees et al v. Peltzer et al.,* 315

2. *Condition in bond to pay such damages as may be awarded.*—Where the condition of the bond was to pay such damages as may be awarded on dissolution of the injunction, such condition, in the absence of such award, is not broken, and no recovery can be had thereunder. *Rees et al v. Peltzer et al.,* 315

3. *Damages for wrongful suing out of injunction.*—Where an injunction bond is conditioned for the payment of all costs and damages that should accrue by reason of the wrongful suing out of the injunction, suit for a breach of such condition may be maintained, although there has been no assessment of damages under the act of 1861. *Rees et al v. Peltzer et al.,* 315

4. *Suit on bond—Damages to part of obligees not recoverable.*—In a suit on an injunction bond, conditioned for the payment, to all the obligees, "all costs and damages that shall accrue by reason of the wrongful suing out of the injunction," no recovery can be had for damages sustained by a part only of the obligees. *Rees et al. v. Peltzer et al.,* 315

5. *Damages pending appeal.*—On appeal to the Supreme Court, from a decree dismissing a bill for injunction, although the injunction was kept in force by perfecting an appeal, no damages sustained by reason thereof can be recovered under the condition in the bond providing for the payment of such damages as should accrue by reason of the wrongful suing out of the injunction. Resort must be had to the bond for appeal, for the recovery of such damages. *Rees et al. v. Peltzer et al.,* 315

WHEN GRANTED.

6. *To restrain highway commissioners.*—A court of equity will afford preventive relief, by injunction, to restrain commissioners of highways from appropriating private lands to the use of the public for a highway.

Willett et al. v. Woodhams et al., 411

PRAYER FOR.

7. Prayer for an injunction must be in the prayer for process as well as in the prayer for relief. *Willett et al. v. Woodhams et al.,* 411

INSTRUCTIONS.

OF THEIR REQUISITES, ETC.

1. *Should be based on the evidence.*—The following instruction was held erroneous, there being no evidence upon which to predicate it: "The court instructs the jury that if they believe from the evidence, that the village of South Evanston, by its agent or agents, procured the defendant to violate the ordinance in question, in the manner complained of, then the law is for the defendant and the plaintiff cannot recover in this action." *Village of South Evanston v. Lynch*, 63

2. *Should be confined to the testimony.*—It is not error to confine instructions to the testimony in the case. *Guill et al. v. Hanny*, 490

3. *Assuming existence of evidence.*—An instruction that pre-supposes or assumes that there is some evidence in the record to establish a certain fact, there being no such evidence, is erroneous. *Pease v. Catlin*, 88

4. *That jury disregard testimony.*—There being no evidence to show that plaintiff ever had knowledge of the statements made or consented to them, an instruction asked on the part of the plaintiff, that the jury disregard all evidence tending to show the terms on which a third person had told the defendant that plaintiff would collect the claims, was improperly refused. *Stein v. Kendall*, 103

5. *Modifications by the court.*—A modification by the court of an instruction which has the effect to mislead the jury, is a substantial error for which the cause will be reversed. *Orr v. Jason, Adm'r*, 439

6. *As to payment of debt by note.*—Where the evidence tended to show that the plaintiff accepted a note in payment of the original debt, an instruction to the effect, that if the plaintiff accepted said note as payment, then such payment was a satisfaction of the bill, and the fact that the plaintiff afterward gave such note to the defendant's bookkeeper would not revive such account unless it appear from the evidence that the bookkeeper had authority to receive the same, and that there was an agreement canceling the acceptance of said note and reviving such account was proper. *Kappes et al v. Geo. E. White Co.*, 280

INSURANCE.

POLICY OF.

1. *Construction of condition limiting time of bringing suit.*—A clause in a policy of insurance providing that suit to recover for a loss should be commenced "within twelve months next after the loss shall occur," is valid. The words have reference to the happening of the casualty, and not to the time when such loss by the terms of the policy becomes due. *Humboldt Ins. Co. v. Johnson et al.*, 309

PRACTICE.

2. *Pleading limitation in policy of insurance.*—The same rules of pleading should prevail in respect to the limitation of time to bring suit provided in a policy for insurance, as in case of other limitations of actions, and such limitation should be pleaded specially. *Humboldt Ins. Co. v. Johnson et al.*, 309

3. *When limitation may be shown under the general issue.*—Where the declaration on a policy containing such condition, sets forth proper

INSURANCE.

PRACTICE. *Continued.*

averments of facts excusing the delay in bringing the suit, such limitation may be shown under the general issue. *Humboldt Ins. Co. v. Johnson et al.*, 309

INTEREST.

RATE PER CENT.

1. *When no rate agreed upon.*—Where no rate per cent. of interest is agreed upon between the parties, only six per cent. can be recovered. *Convey v. Sheldon*, 555

WHETHER RECOVERABLE.

2. *Action sounding in damages only.*—Under our statute no interest can be allowed in an action for breach of an executory contract sounding in damages only. *Kelderhouse v. Saveland*, 65

3. *Not allowed when.*—It is error to allow interest when none is claimed by the petitioner in his petition. *Race et al. v. Sullivan*, 94

JUDGMENTS.

BY CONFESSION.

1. *Authority of court to set aside.*—Courts of law exercise an equitable jurisdiction over judgments entered by confession, and where it clearly appears that the plaintiff was not entitled to a judgment, the court should vacate the same, and allow him to pursue the ordinary remedy by action. *Walker v. Ensign*, 113

2. *Practice when judgment set aside.*—Where the right of the defendant is involved in doubt, the defendant should be let in to defend, the judgment in the meantime being allowed to stand as security until the merits of the case have been determined. *Walker v. Ensign*, 113

AMENDMENT OF

3. *When to be upon notice.*—While courts have authority over their records to correct clerical errors, and if done at the time at which judgment is rendered, without notice, it is error to allow an amendment, even in matters of form, at a subsequent term, without notice. *Rauh E'x v. Ritchie, Ex'r*, 188

4. *When may be questioned collaterally.*—Where a court has jurisdiction of the subject matter and of the person, the judgment is binding and cannot be questioned collaterally, but if such jurisdiction in either particular be wanting, the judgment is a nullity, and can be attacked by any one affected by it, in any and all proceedings, either direct or collateral. *Bannon v. The People*, 496

5. *Presumption of Jurisdiction.*—Where there is no special finding of the court, the presumption of jurisdiction must be consistent with the record, for the court will be presumed to act upon and acquire jurisdiction from the facts alone as they appear in the record, and if these facts appear insufficient, the presumption is overcome and the judgment held void. *Bannon v. The People*, 496

6. *Jurisdictional finding by the court.*—But where the court adjudges that it has jurisdiction, it is not enough to destroy it, that the record is insufficient to support such finding, for it will be presumed that the court

JUDGMENTS.

AMENDMENT. *Continued.*

heard other evidence not necessary to preserve in the record, or that it acquired jurisdiction in some other manner than that stated. In such cases, before such finding can be impeached, or the jurisdiction destroyed, the record must show affirmatively that such finding cannot be true.

Bannon v. The People,

496

ASSIGNMENT.

7. *Burden of Proof.*—Where a party claims that a judgment had been assigned to him previous to payment and that the judgment debtor had notice of such assignment, the burden of proof is upon the party alleging such notice to prove the same. *Burritt v. Tidmarsh et al.,* 571

JURISDICTION.

AT LAW AND IN CHANCERY.

1. *In creditor's bills.*—A court of chancery, in the absence of fraud, has no jurisdiction in a creditor's bill, where the answer denies the possession of assets, to try the issue thereby made and grant relief in case the defendant is found to be possessed of assets of the judgment creditor. *Phil. Fire Ins. Co. v. Cent. Nat. B'k,* 344

2. *Not to restrain collector from paying over tax illegally collected.*—A bill in equity will not lie to restrain a collector of taxes from paying over, according to his warrant, a tax collected under an illegal assessment, there being a complete remedy at law to recover it back. *Kimball v. Corn Exchange National Bank,* 209

3. *To restrain public officers.*—In the absence of fraud, a court of equity has no jurisdiction to restrain a Board of County Commissioners from consummating the settlement of a disputed claim against the county. *Harms v. Fitzgerald,* 325

4. *In local actions.*—A justice of the peace in the county where the parties reside may take jurisdiction of an action for damages to land, although the injury occurred in an adjoining county. *Pilgrim v. Mellor,* 448

OF CIRCUIT COURT.

5. *On appeal from county court.*—The circuit court on an appeal from the county court, can take only the same jurisdiction as the court appealed from. *Lill et al. Ex'rs, v. Brant, Adm'r,* 266

OF COUNTY COURT.

6. *In matters of trust.*—The county court has not jurisdiction in matters relating to the settlement of trusts. *Lill, et al. Ex'rs, v. Brant, Adm'r,* 266

JUSTICE OF THE PEACE.

JURISDICTION.

1. *In local actions.*—A justice of the peace in the county where the parties reside may take jurisdiction of an action for damages to land, although the injury occurred in an adjoining county. *Pilgrim v. Mellor,* 448

2. *Consolidation of claims.*—Where the plaintiff held two notes against the defendant, which, when consolidated would exceed the jurisdiction of the justice, he may bring separate suits upon them before the same justice on the same day, but if, when consolidated they do not

JUSTICE OF THE PEACE.

JURISDICTION. *Continued.*

exceed the jurisdiction of the justice, he must bring them both forward in one suit. *McCoy et al. v. Babcock*, 414

LACHES.

1. *When estopped to insist upon.*—It was insisted that appellants were guilty of such laches as should prevent them from having relief under a claim of a vendor's lien; but appellees having expressly agreed to pay the unpaid purchase money, and having deducted that amount from the price they agreed to pay, it does not become them to complain of laches which they could easily have prevented by paying an honest debt. *Thompson v. Scott et al.*, 641

LANDLORD & TENANT.

LEASE.

1. *To commence in futuro—liable for use and occupation.*—Under a contract for renting for a year to commence in the future, where the lessee takes possession, he is liable for the use and occupation though the contract, as an executory one, may be within the Statute of Frauds. *Smith v. Kinkaid*, 620

2. *Repairs by tenant.*—Unless there was an express contract by the landlord to repair, the tenant cannot recover for repairs made by him, or for damages sustained by reason of non-repair. *Smith v. Kinkaid*, 620

LIBEL.

PLEADING.

1. *Office of inuendo.*—Although an inuendo cannot enlarge the real sense of the words, yet if under the circumstances stated in the declaration, that which was alleged could be reasonably imputed to them, then the allegation of such meaning is strictly its proper function. *Gault v. Babbitt*, 130

DEFENSES.

2. *Justification—when a bar.*—A plea of justification, by its nature, is in confession and avoidance, and is a complete bar, but is not a bar unless it confesses and avoids by justifying the entire charge substantially as made. *Gault v. Babbitt*, 130

3. *Effect of justification.*—A plea in confession and avoidance admits a *prima facie* case for the plaintiff, and no amount of evidence in support of such a plea will justify the court in taking from the jury a consideration of the issue under it. *Gault v. Babbitt*, 130

MANDAMUS.

WHEN WILL NOT LIE.

1. *Exercise of discretionary powers.*—Whenever the act sought to be enforced requires the exercise of discretion, as the power of a city council to judge of the election and qualification of its own members, mandamus will not lie. *Hildreth v. Heath et al.*, 82

MARRIED WOMEN.

CONTRACTS OF.

1. *Common law rule—removal of disability of.*—At common law a promise by a married woman was not obligatory upon her, but the acts

MARRIED WOMEN.

CONTRACTS OF. *Continued.*

of 1861 and 1869, by implication, empowered a married woman to make contracts relating to her separate property. *Garland et al v. Peeney*, 108

2. *Exceptions of the statute—burden of proof.*—Her power at law to make binding contracts was still exceptional under the statutes; the presumption was still against her legal capacity, and it is incumbent upon a person seeking to charge her upon such a contract to show affirmatively that it related to her separate property acquired in some of the ways mentioned in the statute and within the exception which gave her capacity. *Garland et al v. Peeney*, 108

MASTER AND SERVANT.

INJURY TO SERVANT.

1. *Liability of employer.*—Although the accident which caused the death of the servant was not occasioned by his fault, yet if he was aware of the defect which occasioned the accident, there can be no recovery against the employer, even though the servant exercised the greatest care to prevent the accident, or to keep out of the way of its effects. *Morris v. Gleason*, 510

2. *Defects for which an employer is liable.*—In order to make the employer liable for defects known by him to exist, they should be of a character which he could, by exercising skill, have ascertained would be likely to have caused the accident. There may have been defects, and these may have been known to the employee, and have been such as no amount of caution on his part would disclose to be dangerous, and to be guarded against. *Morris v. Gleason* 510

3. *Employer not an insurer of employee.*—An employer is not an insurer of his servant against accident from defective machinery. *Morris v. Gleason*, 510

4. *Employer not bound by commands of foreman.*—An employer is not responsible for orders given by his foreman in his presence and hearing in relation to the work in progress, because he does not object or dissent therefrom at the time the orders are given, where it appears he had not the necessary knowledge about the peculiar kind of work, or the condition of its progress, to judge of their correctness. *Harms v. Sullivan*, 251

5. *Providing suitable machinery.*—Where a contractor engaged in the erection of a building has provided suitable and safe machinery for the use of his employees, and such machinery is at hand and can be used, and any of the employees, through negligence or error in judgment, select and use machinery of insufficient size and strength, whereby an injury results to a co-employee, the contractor is not liable for such negligence or error in judgment, provided the employees were persons of adequate skill, and careful, prudent persons. *Harms v. Sullivan*, 251

MECHANIC'S LIEN.

OF THE CONTRACT.

1. *What is necessary to constitute a lien.*—It is requisite to the creation of a lien for materials furnished in the erection of a building, that the contract should specify some definite time within which the materials

MECHANIC'S LIEN.

OF THE CONTRACT. *Continued.*

are to be furnished, and a petition to enforce such a lien should so allege, and on the hearing a failure to make proof of such time is fatal. *Peck v. Standart*, 228

2. *Variance between allegation and proof.*—Where the contract, as alleged in the petition, was to furnish materials at the usual market price, and the proof showed that on some articles a discount from the usual market price was to be made, the variance is substantial. *Peck v. Standart*, 228

3. *Lien not regulated by contract.*—The lien is not given or regulated by the contract, but by the statute. *Bayard et al. v. McGraw et al.*, 134

4. *Lien upon each lot respectively.*—The statute gives a lien upon lots and improvements thereon only for the work done and materials furnished towards the improvement of the lots respectively. *Bayard et al. v. McGraw et al.*, 134

5. *Construction of statute relating to.*—The statute giving a mechanics' lien, is in derogation of the common law, and must be strictly construed. *Bayard et al. v. McGraw et al.*, 134

PETITION.

6. *What should be alleged.*—Where a petition for the enforcement of a mechanic's lien undertakes to set out a verbal agreement, between the petitioner and defendant, to furnish materials, and that the defendant was to pay for the same within five or six months from the time the same were delivered, it becomes a special contract, and it is necessary to allege in the petition the time when the materials were delivered. *Rogers v. Powell et al.*, 631

7. *Pleading to be taken most strongly against the pleader.*—Under the present statute, a party may declare upon an implied contract, or upon one partly express or partly implied, but there being no intimation in this case of an implied contract, an allegation of some portions of the contract, and a failure to allege other portions, leads to the inference that the unstated portions were such as could not with safety be averred. *Rogers v. Powell et al.*, 631

DECREE.

8. *Sale under—Payment of surplus.*—Where there is a mortgage upon the property sought to be charged with a mechanic's lien, a decree of sale under a petition therefor should direct the payment of any surplus, to the holder of the mortgage, or to be held subject to the order of the court. *Rogers v. Powell et al.*, 631

INCUMBRANCES.

9. *Cannot be enforced against them, when.*—A mechanic's lien cannot be enforced against any incumbrance, unless suit is brought to enforce the same within six months of the time the last payment becomes due. *Rogers v. Powell et al.*, 631

WAIVER.

10. *Conveyance of land in part payment not.*—Receiving a conveyance of real estate as part payment of a claim for erecting buildings is not a waiver of a mechanic's lien for the residue. *Bayard et al. v. McGraw et al.*, 134

MECHANIC'S LIEN.

OF THE CONTRACT. *Continued.*

11. *Taking a note is not, when.*—Taking the debtor's note is not necessarily, and without regard to the intention of the creditor as to the ultimate effect upon the liability of the debtor, a payment of the debt or waiver of the lien. *Bayard et al. v. McGraw et al.*, 134

12. *Negotiation of note so given—must surrender before decree.*—The act of negotiation of a note so given adds no force to the taking, nor would a procuring judgment thereon, but in either case before the creditor can have his decree for a lien, he must surrender or cancel the note. *Bayard et al. v. McGraw et al.*, 134

GENERALLY.

13. *Proceeds of sale under decree—how applied.*—Where a decree ascertained the several amounts by applying a credit of \$1,200 for brick furnished and used in six of the houses, to the whole claim instead of to those particular houses, and directed that the proceeds of the sale should be applied on the aggregate, and not upon the amount due upon the lots sold, respectively, it was erroneous. Such apportionment is contrary to the statute. *Bayard et al. v. McGraw et al.*, 134

PARTIES.

14. *Cestui que trust a necessary party.*—In a proceeding to enforce a mechanic's lien, both the trustee and *cestui que trust* should be made parties. *Bayard et al. v. McGraw et al.*, 134

LIMITATION OF ACTION.

15. *Proceeding against a cestui que trust.*—A failure to commence proceedings for a mechanic's lien against the *cestui que trust* until after the expiration of the time limited in the statute, postpones the lien of the petitioner to that of the *cestui que trust*. Making the trustee a party within the time limited will not affect the rights of his *cestui que trust*. *Bayard et al. v. McGraw et al.*, 134

16. *Awarding execution for balance after sale.*—Execution for the balance remaining due after deducting the proceeds of the sale, should be awarded against such defendants only as might be held to pay such balance in an action at law, and in determining such parties the court will be guided solely by the averments in the petition. Resort cannot be had to proof taken before the Master. *Race et al. v. Sullivan*, 94

MERGER.

1. *Payment by note.*—Where parties agree to accept a note in payment of a debt, the taking of the note in pursuance of such agreement merges the original cause of action in the note. *Kappes et al. v. Geo. E. White Co.*, 280

MORTGAGES.

INSTRUMENT IN THE NATURE OF A MORTGAGE.

1. *Agreement by married woman.*—Appellant's intestate, in his lifetime, conveyed to appellee, S, a married woman, certain land, and took from her an instrument in the nature of a mortgage, to secure the deferred payments, her husband not joining in such mortgage. Appellee S afterwards conveyed the premises to C, subject to the lien of the vendor

MORTGAGES.

INSTRUMENT IN THE NATURE OF A MORTGAGE. *Continued.*

aforesaid, who in turn conveyed the premises to P and W, with notice of the lien, and who purchased subject thereto. *Held*, that although a deed or mortgage executed by a married woman without her husband joining is void as a conveyance of real estate as to her, though of her separate estate, that was not the question in this case; but whether a married woman can make any kind of a contract in writing by which, in equity, she can create a lien upon her real estate to secure her indebtedness for an unpaid portion of the purchase money. *Thompson et al. v. Scott et al.*, 641

2. *Such agreement good in equity.*—Although such an agreement would not operate as a mortgage by reason of the disability of coverture, it is valid in equity to create a lien or security for the debt. *Thompson et al. v. Scott et al.*, 641

FORECLOSURE.

3. *Trustee should be made defendant.*—In foreclosure of a trust deed by proceedings in chancery, the person named as grantee or trustee in such deed is a necessary party defendant to such proceedings, and it is erroneous to decree a foreclosure and sale of the premises without joining him as a party defendant. *Walsh et al. v. Truesdell*, 126

DECREE.

4. *Attorney's fees not allowed unless claimed in the bill.*—No allowance for attorney's fees can be made in a decree, even upon a default, when no claim is made therefor in the bill, even though the mortgage contained a provision for payment of attorney's fees in case of foreclosure. *Augustine et al. v. Doud*, 588

5. *Rendered in vacation—Appeal from.*—Where an appeal was prayed at the same term at which the decree purports to have been rendered, though in fact the decree was subsequently signed in vacation, and the prayer for appeal remained undisposed of until the term following, the court had the power to make an order allowing the appeal at the latter term. *Augustine et al. v. Doud*, 588

6. *Re-sale by Master.*—Although it is not the correct practice for the Master to re-sell the property without an order of court, on the failure of the purchaser to comply with the terms of sale, still if he does re-sell upon his own responsibility, it would not necessarily be sufficient ground to hold the second sale void. *Augustine et al. v. Doud*, 588

7. *Finding of service—Presumption.*—Where the decree finds that service was duly had upon the defendant, it will be presumed from such finding that evidence of that fact was heard and the party properly in court. *Augustine et al. v. Doud*, 588

SUBROGATION.

8. *Payment of claim by mortgagee.*—A voluntary payment by the mortgagee of claims against the estate, which was not necessary for the protection of his own interest in the property, will not entitle him to be subrogated to the rights of the creditors whose liens he discharged. *Bayard et al. v. McGraw et al.*, 134

NEGLIGENCE.

CONTRIBUTORY.

1. *Passenger alighting from cars.*—Where a railway company has provided a proper landing place for passengers, and the passenger knows or has the means of ascertaining its locality, should make his exit at that place; and if, in attempting to alight elsewhere he unnecessarily and negligently exposes himself to danger, and is thereby injured, his injury is the result of his own act, and he cannot recover therefor against the company. *C. R. I. & P. R. R. v. Dingman*, 162

2. *Passing under railroad car.*—Where it appeared that the conductor of the train by which the deceased was injured in crawling under, had called out to the deceased to "come on under, you will have plenty of time," the invitation by the conductor should be taken into account along with the other circumstances of the case, in determining whether the deceased exercised due care in attempting to pass the train in that manner. *C. B. & Q. R. R. Co. v. Sykes' Adm'r*, 520

3. *Instruction as to.*—An instruction that if the jury find the defendant was guilty of gross negligence, the plaintiff can recover, even though he may have been guilty of a comparatively slight degree of negligence, is erroneous, because it tells the jury that if they find the defendant was guilty of gross negligence the plaintiff may recover, whether such negligence contributed to the injury or not. *Harms v. Sullivan*, 251

4. *Permitting stairways in streets—Negligence.*—In considering the degree of negligence properly attributable to a city in allowing the construction of stairways as entrances to basements from the street, it is not to be judged of from the fact of one injury, but rather what would have been the course of prudent persons prior to the accident; would it be considered that the sidewalk was unsafe by reason of such entrance? *City of El Paso v. Causey*, 531

5. *Contributory—Finding of jury.*—The jury having by their verdict exonerated the plaintiff from the charge of contributory negligence, the court, from what evidence appears in the record, is not disposed to question the correctness of such finding. *City of Chicago v. Garin*, 302

NEW TRIAL.

GROUND FOR.

1. *Newly discovered evidence.*—In an action on a lost capias bond, the only proof of the sum endorsed on the writ was the evidence of one witness, who testified that it was either \$3,000 or \$3,500. After the entry of judgment, and during the same term, the affidavit of this witness was offered in support of a motion for new trial, stating that the witness now recollected positively that the sum endorsed was \$1,500. If the validity of the bond depended upon the amount endorsed upon the writ, the testimony of the witness, according to his subsequent recollection, would set the question at rest, and the party should have been accorded an opportunity of introducing it. *Beveridge v. Chellain*, 231

PARDON.

REMOVAL OF DISQUALIFICATION BY.

1. *Effect of.*—A pardon by the President of the United States for a

PARDON.

REMOVAL OF DISQUALIFICATION BY. *Continued.*

offense against the laws of the United States, removes the disqualification, if any existed, of a person to hold office under a city government. *Hildreth v. Heath et al.*, 82

PARENT AND CHILD.

SUPPORT OF CHILD.

1. *Duty of Parent.*—The natural obligation of a parent to provide for his child is a sufficient consideration to support an express promise by him to pay for necessities furnished the child, and under certain circumstances is sufficient to raise an implied promise. *Clark v. Gotts*, 454

2. *Necessaries furnished by another.*—A party furnishing necessities to an infant is bound to inform himself of the condition of the child and the reasons why the parent does not provide for him, and if it cannot be shown that such necessities are the result of the parent's neglect, no action can be maintained on an implied promise to pay therefor. *Clark v. Gotts*, 454

3. *Burden of proof is upon the party furnishing.*—Where a third person furnishes necessities to an infant, the burden of proof is upon him to show that the parent expressly promised to pay therefor, or such circumstances of the parent's neglect as that a promise may be inferred therefrom. *Clark v. Gotts*, 454

PARTIES.

IN CHANCERY.

1. *In proceedings for an accounting.*—In a proceeding by an administrator against certain parties alleged to have been agents of his intestate, for an accounting of their agency, the heirs of the intestate are not necessary parties because of their interest. *Sturgeon, adm'r, v. Burrall et al.*, 537

IN FORECLOSURE.

2. *Trustee should be made defendant.*—In foreclosure of a trust deed in chancery, the trustee named in the deed should be made a party defendant. *Walsh et al. v. Truesdell*, 126

3. *Subsequent mortgagee.*—Where the record discloses that a person has an interest as the assignee of a subsequent mortgager, he should be made a party to the proceeding for foreclosure. *Augustine et al. v. Doud*, 588

4. *Should be made a party.*—Where the record disclosed that a certain person had an interest as assignee of a subsequent mortgagee, it was error to render a decree of foreclosure without making him a party to the proceedings. *Augustine et al. v. Doud*, 588

IN MECHANIC'S LIEN.

5. *All whose interests may be affected must be.*—In proceedings to enforce a machanic's lien, all persons whose interests, either legal or equitable, direct or remote may be affected by the decree, should be made parties. *Race et al. v. Sullivan*, 94

MISJOINDER.

6. *When need not be pleaded.*—A plea verified by affidavit denying

PARTIES.

MISJOINDER. *Continued.*

joint liability is unnecessary where it affirmatively appears that parties are made defendants against whom no cause of action exists. *Darison et al. v. Hill*, 70

7. *Joint liability may be denied under the general issue.*—The statute requiring denial of joint liability to be made plea, verified, is not intended to forbid that question to be raised in any other manner, but merely to relieve the plaintiff of the common law burden of proving a joint liability in the first instance. *Garland et al. v. Peeney*, 108

PARTNERSHIP.

GENERALLY.

1. *Rights of majority.*—Whatever may be the power of the majority in intent over the business of a public warehouse, their right to exercise such control in utter disregard of the rights and wishes of the minority cannot be conceded. *C. B. & Q. R. R. Co. et al. v. Hoyt et al.*, 374

LIMITED.

1. *Formation of—statutory requirements.*—In order to the formation of a limited partnership under the statute, the provisions of the statute must be substantially complied with. *Pfirmann et al. v. Henkel et al.*, 145

2. *Certificate of, must remain on file.*—The statute relating to the formation of limited partnership contemplates not only that the certificate and affidavit shall be filed and recorded in the clerk's office, but that they shall remain on file there. *Pfirmann et al. Henkel et al.*, 145

3. *Special partner—limiting liability.*—Before a special partner can claim the protection of the statute as to the limit of his liability, he must see that all its requirements are complied with, and if he fails so to do, the limitation upon his liability is destroyed. *Pfirmann et al. v. Henkel et al.*, 145

4. *What is not a substantial compliance with the statute.*—Sending the required certificate to the county clerk's office, where a certificate of the official character of the notary before whom it was acknowledged was affixed, when it was taken away, and after several months was returned to the clerk's office and filed and recorded, is not, as against a creditor whose debt accrued before the certificate was filed and recorded, a substantial compliance with the statute. *Pfirmann et al. v. Henkel et al.*, 145

5. *Compliance with the statute.*—The statute of this State in relation to formation of limited partnerships contemplates, not only that the certificate and affidavit mentioned should be filed and recorded in the office of the county clerk, but that they should remain on file in his office. These requirements are of the very substance of the statute, and should be substantially complied with. *Pfirmann et al. v. Henkel et al.*, 145

6. *What not a sufficient compliance.*—Merely depositing them in the office of the county clerk for the purpose of filing and recording, and afterwards withdrawing them, would not be a substantial compliance with the statute. *Pfirmann et al. v. Henkel et al.*, 145

PARTNERSHIP. *Continued.*

SURVIVING PARTNER.

8. *Statute relating to duties of.*—The statute of this State relating to the duties of a surviving partner in the management of the partnership estate, is but declaratory of what the law was before its enactment. It provides some additional remedies, but does not change the rights or duties of the parties, only the mode of performing them. *Forrester, Ex. v. Oliver, Adm'r, et al.,* 259

9. *Liable for losses.—Common law rule.*—The death of one member of the firm works a dissolution of the partnership, and terminates the power of the surviving partner to carry on the business, or to engage in new transactions, contracts or liabilities on account thereof. If he continues the business, it is at his own risk, and he will be liable to account for the profits made, or to be charged with interest on the deceased partner's share of the surplus, besides bearing all losses. *Forrester, Ex. v. Oliver, Adm'r, et al.,* 259

10. *Relation of surviving partner to the legal representatives of deceased partner.*—On the death of one member of the firm, the relation of trustee and *cestui que trust* is created between the surviving partner on the one hand, and the legal representatives of his deceased partner and the creditors of the firm on the other; the terms of the trust being, that he will, without delay, proceed to close up the business of the firm as required by statute. *Forrester Ex. v. Oliver, Adm'r, et al.,* 259

PAYMENT.

BURDEN OF PROOF.

1. *Is upon the party alleging payment.*—Where payment is set up as a defense to an action for the recovery of money, the burden of proof is upon the party making such defense to establish the fact of such payment by a fair preponderance of evidence. *Johnson v. Breaton,* 293

BY PROMISSORY NOTE.

2. *Agreement of parties.*—Where parties agree to accept a note in payment of a debt, the taking of such note in pursuance of the agreement, merges the original cause of action in the note. *Kappes et al. v. Geo. E. White Co.,* 280

REPUDIATION.

3. *Consideration must be returned.*—Where the plaintiff in error had received full payment of the judgment in question, before he or his pretended assignee could repudiate such settlement, there should have been a return or offer to return the consideration received. *Burritt v. Tidmarsh et al.,* 571

PLEADING.

DEMURRER.

1. *For multifariousness.*—Mere surplusage does not make a bill in chancery multifarious or otherwise bad on demurrer. *Sturgeon, Adm'r v. Burrall et al.,* 537

GENERAL ISSUE.

2. *What may be shown under—Joint liability.*—A plea of the general issue requires of the plaintiff proof tending to show a contract that will

PLEADING.

GENERAL ISSUE. *Continued.*

charge both defendants, and if it appears that one of the defendants is incompetent to contract, that fact must defeat the action. *Garland et al. v. Peeney, use, etc.*, 108

THE DECLARATION.

3. *In action against married women.*—A declaration in an action to charge the separate estate of a married woman, averring a promise to pay for work and materials for the dwelling house of the defendant, but failing to aver that the house was acquired in some one of the ways mentioned in the statute, is defective for want of a sufficient averment. *Garland et al. v. Peeney*, 108

4. *Variance—Suit on appeal bond.*—In a suit upon an appeal bond, in describing the judgment appealed from, the plaintiff is bound to set it out with such reasonable accuracy as to identify and distinguish it. An allegation of a judgment against two is not supported by proof of a judgment against one only. *Dupuis et al. v. McCausland*, 395

ALLEGATIONS AND PROOFS.

5. *Upon special contracts.*—In actions upon special contracts the allegations and proofs must agree, or no recovery can be had. *Kelderhouse v. Saveland*, 65

AMENDMENTS.

6. *A matter of right—Terms cannot be imposed.*—Leave to amend pleadings is no longer discretionary, but the right of the party, and the defendant cannot be required, as a condition to such amendment, to show by affidavit of facts in detail that he has a meritorious defense. *Empire Fire Ins. Co. v. Real Estate Trust Co.*, 391

GENERALLY.

7. *Plea of tender, admits liability.*—A plea of tender admits a liability to the plaintiff to the extent of the sum named in the plea. *Beach et al. v. Jeffrey*, 283

8. *Limitation in insurance policy.*—A condition in an insurance policy limiting the time in which to bring suit for a loss thereunder, should be set up under a special plea. *Humboldt Ins. Co. v. Johnson et al.*, 309

9. *When may be shown under the general issue.*—But where the declaration on such a policy avers facts excusing the delay in bringing the suit, such limitation may be shown under the general issue. *Humboldt Ins. Co. v. Johnson et al.*, 309

10. *Office of inuendo.*—Although an inuendo cannot enlarge the real sense of the words, yet if under the circumstances stated in the declaration, that which is alleged can be reasonably imputed to them, then the allegation of such meaning is strictly its proper function. *Gault v. Babbitt*, 130

PRACTICE.

AFFIDAVIT OF PLAINTIFF'S CLAIM.

1. *Sufficiency.*—An affidavit stating that "the demand in the above entitled cause is for the amount due on a promissory note, a copy of which is hereunto attached, in possession of the defendant, and there is due to the plaintiff from the defendant, after allowing to him all just

PRACTICE.

AFFIDAVIT OF PLAINTIFF'S CLAIM. *Continued.*

deductions and set-offs, five hundred and eighty-four dollars and sixty-two cents, with interest from December 23, 1877," is not a substantial compliance with the statute; it does not state the "amount due from the defendant to the plaintiff;" nor does it state such facts as furnish the basis for a calculation of the amount due. *Gottfried v. German Nat. Bank,* 224

2. *Reference in affidavit to the note.*—An allusion in the affidavit to a copy of a note, without any apt or proper words making such copy a part of the affidavit, is not sufficient to warrant the court in referring to such copy for any purpose connected with the affidavit. *Gottfried v. German Nat. Bank,* 224

3. *Construction of statute relating to.*—The statute permitting a plaintiff to file with his declaration an affidavit of the amount due, is remedial, and should receive such interpretation as will meet the obvious intent of the legislature in its enactment. *Gottfried v. German Nat. Bank,* 224

AMENDMENTS.

4. *Right to amend pleas.*—Leave to amend pleadings necessary to present an issue on the merits of a cause is no longer discretionary with the courts, but is the legal right of the party. *Empire Fire Ins. Co. v. Real Estate Trust Co.,* 391

5. *Imposing terms on amendment.*—The court has no right to require the defendant to show by an affidavit of facts in detail, a meritorious defense, as a condition of amending pleas. *Empire Fire Ins. Co. v. Real Estate Trust Co.,* 391

BILL OF EXCEPTIONS.

6. *Presumption as to filing in time.*—It will be presumed that the judge would not have signed a bill of exceptions unless it was presented to him in proper time, and whatever delay may have intervened after it was signed and before it was filed, will be presumed to have been occasioned by the pressure of other engagements on the part of the judge, or his failure to deliver it for filing, and not to any neglect on the part of appellant. The burden of proving such neglect, if any, is upon appellee. *Stein v. Kendall,* 101

7. *Signing in vacation.*—It is immaterial whether at the time the order to file the bill *nunc pro tunc* was made, the court was in session or not; the presumption is that it was presented to the judge within the thirty days, and that for reasons for which he alone is responsible it was not actually filed until after the thirty days had expired. *Stein v. Kendall,* 101

8. *Defective.*—A bill of exceptions signed by the judge, with delegated authority to a reporter to write out his notes, and to the clerk to admit them when written out, to be placed among the files and inserted in the record in the shape of skeleton notes, with a skeleton bill of exceptions, will not be tolerated. It amounts to nothing more than a statement that there was evidence, presumably enough. *Hayward et al. v. Catton,* 577

PRACTICE.

BILL OF EXCEPTIONS. *Continued.*

9. *General exception.*—A general exception to a series of instructions is like a general demurrer to a declaration; if there are some good instructions the exception cannot be noticed. *Hayward et al. v. Catton*, 577

10. *Must contain all the evidence.*—A bill of exceptions must state that it contains all the evidence in the case, or it will be presumed that there was sufficient evidence to sustain the finding. *Noy v. Creed*, 557

CONSOLIDATION OF CLAIMS.

11. *When unnecessary.*—Where a plaintiff holds two notes against the defendant, which, when consolidated, would exceed the jurisdiction of the justice, he may bring separate suits upon them, before the same justice on the same day. Each note then constitutes a separate demand. *McCoy et al. v. Babcock*, 414

12. *When necessary.*—If the two notes, when consolidated, would not exceed the jurisdiction of the justice, the plaintiff must bring them both forward in one suit. *McCoy et al. v. Babcock*, 414

GENERALLY.

13. *Advancing cause.*—Taking a cause from its regular place upon the docket and trying it out of its order under the provisions of the five-day rule, is erroneous. *Sea v. Glover*, 335

14. *No presumption of discretion.*—Where it affirmatively appears that a case was taken up and tried out of its order under a rule of court known as the five-day rule, any presumption of the exercise of the discretion of the court upon any other ground will be excluded. *Smith v. Lozano et al.*, 171

15. *Five day rule.*—The practice act provides a uniform rule in courts of record in respect to taking up cases out of their order on the docket, and the rule of the Superior Court, known as the five-day rule, establishing a different practice, is inconsistent with the general law, and therefore void. *Nelson et al. v. Akeson*, 165; *Gormley et al. v. Uthe*, 170

16. *Apportioning costs.*—The apportionment of costs, on appeal from a justice, is the exercise of a discretion not reviewable on error. *Smith v. Kinkaid*, 620

17. *Demurrer.*—After a demurrer to a plea, setting up special facts as a defense, has been sustained, such facts cannot be shown under the general issue. *Humboldt Ins. Co. v. Johnson et al.*, 309

18. *Directing a non-suit.*—A plea in confession and avoidance admits a *prima facie* case for the plaintiff, and no amount of evidence in support of such plea will justify the court in taking from the jury a consideration of the issue under it. *Gault v. Babbitt*, 130

19. *Waiver of instructions.*—A waiver of the right to ask instructions given to the jury, does not preclude a party from assigning errors of law on appeal. *Glenn v. Kasy et al.*, 479

20. *Withdrawing evidence from the jury.*—Where evidence has been allowed to go to the jury and is afterwards withdrawn, and it is apparent that such evidence constituted the only basis on which a verdict was found, the case should be reversed. *Smith v. Kinkaid*, 620

PRACTICE. *Continued.*

INSTRUCTIONS.

21. *Conflict in evidence.*—Where there is a conflict in the evidence the verdict will not be disturbed. *Vanderslice v. Mumma*, 434
22. *Defective, not cured by others not defective.*—Substantially defective instructions are not cured by others not containing the imperfections. *Morris v. Gleason*, 510
23. *Erroneous as to measure of damages.*—Although an instruction as to the measure of damages may have been erroneous, yet where it appears that the amount allowed is no more than the party was entitled to under the evidence, the case will not be reversed for error in the instructions. *Vanderslice v. Mumma*, 434
24. *Modification.* A modification of an instruction, by the court, which has the effect to mislead the jury, is erroneous. *Orr v. Jason, Adm'r*, 439
25. *Must be based on evidence.*—Where there was no evidence tending to show a voluntary abandonment, an instruction based upon the assumption of abandonment was properly refused. *Vanderslice v. Mumma*, 434
26. *Where evidence is conflicting.*—Where the evidence upon a question is so conflicting that the jury may find either way without doing violence to the testimony it is essential that the jury should be properly instructed. *City of Mendota v. Fay*, 418

JUDGMENT BY CONFESSION.

27. *Power of Court to set aside.*—Courts of law exercise an equitable jurisdiction over judgments entered by confession upon notes and warrants of attorney, and where it clearly appears that the plaintiff was not entitled to a judgment the court should vacate the same and allow him to pursue the ordinary remedy by action at law. *Walker v. Ensign*, 113
28. *When defense may be made.*—Where the right of plaintiff to a judgment is involved in doubt, the defendant should be let in to defend; the judgment in the meantime being allowed to stand as security until the merits of the case have been determined. *Walker v. Ensign*, 113

MOTION FOR NEW TRIAL.

29. *When points should be stated in writing.*—The Appellate Court will take notice of nothing not specifically stated in the record as ground of exception. *O. O. & F. R. V. R. R. Co. v. McMath*, 429
30. *When written points need not be filed.*—Errors of the court below are subject to review, although a motion in writing for a new trial be not made. *City of Mendota v. Fay*, 418

OBJECTIONS TO DEPOSITIONS.

31. *Should be made before trial, when.*—Objections to questions and answers in depositions should be made and disposed of before trial commences. *Kent, Adm'r v. Mason, Exr.*, 466

ON ERROR.

32. *Scire facias.*—A plaintiff in error has no right to the writ of *scire facias* until a transcript of the record is filed in the Appellate Court. *Breton v. Johnson*, 160

PROMISSORY NOTES. *Continued.*

GENERALLY.

6. *Given for threshing—When void.*—A bare tumbling-rod to a threshing machine, unprotected in any manner, is dangerous *per se*, and dangerous by legislative enactment, and this fact constitutes a defense to an action on a promissory note given for threshing. *Wadleigh et al v. Develling*, 596

7. *Payment by.*—Where parties agree to accept a promissory note in payment of a debt, the taking of such note in pursuance of the agreement, merges the original cause of action in the note, and a recovery, if had at all, must be had upon the note. *Kappes et al. v. Geo. E. White Co.*, 280

8. *Rescission—Return of note.*—If such agreement was in fact made, and a note given in pursuance thereof, the creditor cannot rescind such contract for the purpose of suing upon the original cause of action, by simply returning the note. *Kappes v. Geo. E. White Co.*, 280

RAILROADS.

DUTY AS TO PASSENGERS.

1. *To provide means for alighting from cars.*—It is the duty of railroad companies to provide for their passengers safe and convenient places for landing, and every reasonable facility for alighting with safety; and when a proper landing place is provided and the passenger knows or has the means of ascertaining its locality, he should make his exit at the place so provided, and if in attempting to alight elsewhere, he unnecessarily and negligently exposes himself to danger, he is thereby injured, his injury is the result of his own act, and he cannot recover therefor against the company. *Chicago, Rock Island & Pacific R. R. Co. v. Dingman*, 162

2. *Expulsion of passenger between stations.*—The rule that railroad companies have no right to expel a passenger except at a regular station, is not applicable in all cases, and where it appears that the passenger had been once expelled at a regular station and on the starting of the train again leaped on to the train, he is not entitled to the same consideration as if he had not once been expelled. *C. B. & Q. R. R. Co. v. Boger*, 472

3. *May require tickets produced before entering the cars.*—A railroad company has the right to establish rules requiring passengers to produce their tickets before entering the cars, and may direct the brakemen of the train to require observance of these rules. *C. B. & Q. R. R. Co. v. Boger*, 472

4. *Exemplary damages for expelling passenger.*—In a suit for damages for expelling a passenger from a train, the act complained of must partake of a wanton or criminal nature, or the amount sought to be recovered will be confined to actual compensation, and damages for the indignity suffered cannot be recovered. *C. B. & Q. R. R. Co. v. Boger*, 472

GARNISHMENT.

5. *Railroad company not liable to, when.*—A railroad company is not liable to garnishment for cars received of a connecting line, under run-

RAILROADS.

GARNISHMENT. *Continued.*

ning arrangements existing between them, such as are usually adopted by connecting lines, whereby instead of unloading and transferring their freight from the cars of one company to the cars of another, each received from the other the cars loaded with freight, and hauled them to the place of destination on its own line of road, and after discharging the freight, returned the cars as soon as practicable in due course of business. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 399

6. *Meaning of "person" in garnishee act.*—While the term "all persons," used in the attachment act is sufficiently broad and comprehensive to charge as garnishees all persons having property or effects of the debtor, yet various considerations of public policy may intervene, in the light of which it is assumed the legislature intended a more restricted application of the statute than the language employed would seem to indicate. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 399

7. *Common carrier exempt.*—A common carrier is bound to serve the public fairly and without unjust discrimination; and in the absence of an express contract, nothing but the act of God or the public enemy can excuse it for non-performance; hence there would seem to be no reason why the same considerations which exempt public officers from garnishment should not be extended to common carriers. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 399

MORTGAGE.

8. *What property passes under.*—It is well settled in this State that the rolling stock of a railroad is a part of the realty, so as to pass by a conveyance or mortgage of the road. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 399

NEGLIGENCE.

9. *Passing under train.*—Under ordinary circumstances, and without any encouragement from the servants of the company that it might be safely done, a person attempting to pass a train of cars, to which an engine was attached and liable to be set in motion at any moment, by crawling under the cars, would be guilty of such gross negligence as would prevent a recovery. *C. B. & Q. R. R. Co. v. Sykes, Adm'r*, 520

10. *Invitation by the conductor—Instructions to jury.*—An instruction to the jury to the effect that if the conductor of the train called out to the deceased to "come under, you will have plenty of time," and if the deceased, relying upon such invitation, attempted to go under, using ordinary care, the defendant would be liable, is erroneous, as meaning that if the deceased exercised reasonable care in passing under, it would excuse him, though he was grossly negligent in accepting the invitation. *C. B. & Q. R. R. Co. v. Sykes, Adm'r*, 520

SUBSCRIPTION TO CAPITAL STOCK.

11. *Delivery on conditions.*—Where a subscriber to the capital stock of a railroad delivered such subscription to a director of the company in escrow, not to be delivered until the performance of certain conditions, no recovery can be had upon such subscription in the absence of proof of the performance of such conditions. *O. O. & F. R. V. R. R. Co. v. Hall*, 612

RAILROADS.

SUBSCRIPTIONS TO CAPITAL STOCK. *Continued.*

12. *Failure of conditions.*—The subscription was not to be delivered unless Kendall county failed to vote a subscription for the road. The county did, in fact, vote to subscribe for the road, and such subscription was afterwards declared by the courts illegal. *Held*, that the failure of the subscription by the county did not authorize a delivery to the company of such conditional subscription. *O. O. & F. R. V. R. R. Co. v. Hall*, 612

13. *Delivery to a director.*—A delivery of such subscription to a person who is a director of the company, to be delivered to the company only on the happening of a certain contingency, is not a delivery to the company. *O. O. & F. R. V. R. R. Co. v. Hall*, 612

REPLEVIN.

1. *Question at issue.*—The question in replevin is whether the property in controversy belongs to the plaintiffs, and in an action of replevin for grain in a warehouse, the defendants should be permitted to prove that there was grain in the warehouse belonging to other parties. *Nelson et al. v. McIntyre*, 603

ROADS.

COMMISSIONERS OF HIGHWAYS.

1. *May be restrained by injunction.*—Commissioners of highways may be restrained by injunction from appropriating private lands for public highways. *Willett et al. v. Woodhams et al.*, 411

2. *Treasurer not entitled to commissions.*—The act of 1872, allowing the treasurer of the commissions of highways, commissions upon all sums received and paid out by him, was superseded by the act of 1873, and such treasurer is not entitled to retain as commissions, two per cent. of the moneys of the town received and paid out by him for road purposes during the year 1874. *Town of LaSalle v. Blanchard*, 635

SALE.

COMMISSIONS.

1. *Of real estate broker making a sale, when payable.*—See **BROKER**.

GENERALLY.

2. *Irregularity in.*—An irregularity in the sale of property covered by a chattel mortgage will not affect the validity of the mortgage, or deprive the mortgagee or his assignee of the right to take possession. *Jefferson v. Barkto*, 563

RECISSION.

3. *When cannot be made.*—Where it appears that the vendor, under a contract to sell real estate, is not at fault, the vendee cannot rescind, and recover back the money paid thereon, unless he first place himself in a position to demand of the vendor a compliance with the terms of the contract on his part, and the vendor refuses. *Davison et al. v. Hill*, 70

SCHOOLS.

SCHOOL DIRECTORS.

1. *Power to issue bonds.*—The right of school directors to issue bonds

SCHOOLS.

SCHOOL DIRECTORS. *Continued.*

of their district is made dependent upon a vote of the people of the district. *Bolton v. Board of Education*, 193

2. *Vote determined by the directors.*—The question whether there has been a vote in favor of issuing bonds, is left by the Legislature to be determined by the directors, two of whom are required to act as judges and one as clerk of the election, and their determination of the question is final as to all *bona fide* purchasers for value of such bonds. *Bolton v. Board of Education*, 193

3. *Recitals in bonds — Estoppel.*—Where bonds issued by school directors contain recitals that they were issued by virtue of a vote of the district had according to law, the district is estopped to deny that such had been taken, the bonds being in the hands of a *bona fide* holder. *Bolton v. Board of Education*, 193

STATUTES.

CONSTRUCTION.

1. *Retroactive laws.*—Courts will not give to a law a retroactive operation, even when they might do so without violation of the Constitution, unless the legislative intent in favor of such retrospective operation be already expressed. *Town of LaSalle v. Blanchard*, 635

2. *Constitutional prohibition.*—The Constitution declares that the General Assembly shall never grant or authorize extra compensation to a public officer after service rendered, and a claim for extra services could not be sustained on the ground that a statute has a retroactive operation, for it would then be doubtful if the statute itself could be sustained. *Town of LaSalle v. Blanchard*, 635

STATUTE OF FRAUDS.

PAROL CONTRACT.

1. *For purchase of land.*—A party who has entered into a parol contract for the purchase of land to be paid for in services, and who has performed on his part, cannot repudiate the contract on the ground that it is within the statute of frauds, and recover the value of his services, without first putting the other party in default. *Mitchell v. McNab*, 297

STATUTE OF LIMITATIONS.

GENERALLY.

1. *Conveyance to pay debts.*—The evidence showing that certain personal property was conveyed to a third party for the purpose of paying a claim of certain persons against the grantor, it was *held* that the cause of action as shown, was for the breach of an express contract, and it appearing that the claim had been paid, the cause of action for any surplus remaining after such payment accrued at the time such payment was made, and the Statute of Limitations commenced to run from that time. *Lill et al., Ex'rs, v. Brant, Adm'r*, 266

CONDITIONAL PROMISE.

2. *Will not revive a debt.*—A conditional promise is insufficient to revive a debt barred by the Statute of Limitations. *Tecssen v. Camblin*, 424

STATUTE OF LIMITATIONS. *Continued.*

NEW PROMISE.

3. *To whom must be made.*—To take a case out of the Statute of Limitations the promise must be made to the party seeking its benefit or to some one authorized to act for him. A promise to a stranger is not sufficient. *Teessen v. Camblin*, 424

4. *Previous Consideration in proof under.*—To sustain an action upon a new promise founded on a debt barred by the statute, the previous consideration must be proved. *Teessen v. Camblin*, 424

5. *Intention of parties.*—To support the replication of a new promise evidence was introduced showing that the payee of the note had received from the maker the note of a third party for \$100, which he had endorsed as part payment on the original note. The maker of the note testified that this was given as an accommodation, an act of friendship and was not intended to be or considered as a partial payment on the original note, which was not denied. *Held*, the evidence failed to show any promise which would revive a right of action once barred. *Pease v. Catlin*, 88

6. *Partial payment will not always revive.*—Though there had been evidence of two or more claims, and partial payment had been made to the creditor with no direction by the party paying as to what particular indebtedness the payment was to be applied on, it may be doubted whether such payment is such an act as a promise can be inferred from to pay the balance of any particular indebtedness. *Pease v. Catlin*, 88

WHO MAY PLEAD.

7. *Foreign corporation may plead.*—A foreign corporation may plead the statute of limitations of this State in bar of an action brought against it in the courts of this State. *Pennsylvania Co. v. Sloan*, 364

STOCKHOLDER. See CORPORATIONS.

SUBROGATION.

WHEN NOT ENTITLED TO.

1. *Payment by mortgagee.*—A voluntary payment by a mortgagee of liens against the estate, when such payment was not necessary for the protection of his interest in the property, will not entitle him to be subrogated to the rights of the creditors whose claims he paid. *Bayard et al. v. McGraw et al.* 134

TAXATION.

ASSESSMENT.

1. *Unauthorized increase by county board.*—The addition by the county board to the valuation of personal property in one town, without a corresponding reduction in the valuation of other towns, thereby increasing the aggregate valuation beyond what was actually necessary and incidental to a proper and just equalization, is without authority of law, and void. *Kimball v. Corn Exchange Nat. Bank*, 209

COLLECTION.

2. *Extending time of collection of taxes.*—A city, by ordinance, authorized the collector of taxes to complete the collection on warrants for city

TAXATION.

COLLECTION. *Continued.*

taxes, where the same were in his hands at the expiration of his term of office. *Held*, that the only effect of such ordinance would be to extend the time of performance of those duties which the collector should have performed during his term of office. It did not change the powers, duties or compensation of the collector. *City of Joliet v. Tuohey*. 483

COLLECTOR.

3. *Paying over illegal tax after notice.*—The bank having given the collector notice of its rights in relation to the illegal tax, and demanded re-payment from him, he cannot, by paying over the money according to the terms of his warrant, escape liability to an action on the part of the tax-payer to recover the same back. *Kimball v. Corn Exchange Nat. Bank*. 209

4. *Additional compensation to the collector.*—The city council having, under the statute, fixed the salary of the collector, no additional compensation could be given him, even though additional burdens should be imposed by statute or ordinance of the city. *City of Joliet v. Tuohey*, 483

5. *Collector estopped from denying his official character.*—The collector claimed pay for extra services in collecting taxes and returning delinquent lists after his term of office had expired, and insisted that he was no longer collector, and the city was bound to pay what the services were reasonably worth; but having held himself out to the people as collector, received their taxes and retained his commissions thereon, he is estopped from denying his official character. *City of Joliet v. Tuohey*, 483

JURISDICTION IN CHANCERY.

6. *To recover back tax illegally collected.*—A bill in chancery will not lie to recover back a tax illegally collected on the plea of preventing a multiplicity of suits, because the tax was one paid by a bank on shares of capital stock owned by different shareholders. The excess over the legal tax cannot be said to have been paid for the shareholders, but was money illegally paid by the bank, and for which the shareholders might hold the bank responsible. *Kimball v. Corn Exchange Nat. Bank*, 209

7. *Bill to restrain collection of tax—When allowed.*—A bill in equity to restrain the collection of a tax will be sustained only in cases where the tax is unauthorized by law, or where it is assessed on property not subject to taxation, or where the property has been fraudulently assessed at too high a rate. *Evans v. Gage et al.*, 202

8. *Excessive valuation not sufficient.*—Excessive valuation alone is not sufficient to warrant the interference of a court of equity to restrain the collection of a tax. In the absence of fraud, the valuation fixed by the officers is final, and cannot be reviewed by the courts. *Evans v. Gage et al.*, 202

9. *Failure of assessor to call for a list—Duty of taxpayer.*—If the assessor should fail to call upon the tax-payer, and base his estimate of the amount of his taxable property upon information otherwise obtained, it would afford no ground for restraining the collection of the tax. Every owner of taxable property is deemed to know that the same is liable to taxation, and it is incumbent, upon him if he would protect himself

TAXATION.

JURISDICTION IN CHANCERY. *Continued.*

against an excessive assessment, to appear before the proper board and ask for a review. *Evans v. Gage et al.*, 202

PAYMENT OF TAXES.

10. *Under duress—Illegal tax.*—The payment of a tax levied under an illegal assessment, while the warrant for its collection is in the hands of the collector, and with a view of avoiding a threatened levy and sale, cannot be deemed a voluntary payment, but made under such duress as will entitle the tax-payer to recover it back. *Kimball v. Corn Exchange Nat. Bank*, 209

11. *Action to recover back an illegal tax paid.*—In order to recover back an illegal tax paid under duress, resort must be had to an action at law. *Kimball v. Corn Exchange Nat. Bank*, 209

TENDER.

1. *In actions of tort.*—Defendants in actions of tort may make tender to the plaintiff of such sum as they shall conceive sufficient amends for the injury done, and for costs, if suit has been commenced, and if it shall appear that the sum tendered is sufficient, the plaintiff will not be allowed to recover any costs incurred after such tender. *Beach et al. v. Jeffrey*, 283

2. *Effect of plea of—Admission of liability.*—A plea of tender is an admission of liability, and the defendant is estopped by the record from denying that he is indebted to the plaintiff in the sum named in his plea. *Beach v. Jeffrey*, 283

THRESHING MACHINE.

STATUTORY REGULATIONS.

1. *Tumbling-rods required to be boxed.*—The statute requires that the tumbling rods to a threshing machine should be boxed, and the fact that they were not, constitutes a defense to an action on a promissory note given for threshing. *Wadleigh et al. v. Derelling*, 596

2. *Attempt to secure them.*—If there had been any attempt to secure the tumbling-rods by boxing, or any other substituted contrivance, the question whether the shafting was secure would be one of fact for the jury. *Wadleigh et al. v. Derelling*, 596

TOWNS.

ACTION AGAINST OFFICER.

Need not be upon his bond.—In an action by a town in its corporate capacity to recover money received by one of its officers to its use, the remedy by action upon his official bond is not exclusive, but the town may have its remedy at common law therefor. *Town of LaSalle v. Blanchard*, 635

TRESPASS.

1. *Hunting on enclosed grounds.*—The fact that the defendants were in pursuit of wolves or other animals *feræ naturæ* and dangerous to mankind, for the purpose of their destruction, gives them no license to trespass upon the lands of others. *Glenn v. Kays et al.*, 479

TRUSTS AND TRUSTEES.

WHETHER A TRUST.

1. *Conveyance to pay debts.*—The evidence showing that certain personal property was conveyed to a third party for the purpose of paying a claim of certain persons against the grantor, it was *held* that the cause of action as shown, was for the breach of an express contract, and it appearing that the claim had been paid, the cause of action for any surplus remaining after such payment accrued at the time such payment was made, and the statute of limitations commenced to run from that time. *Lill et al. ex'rs, v. Brant, adm'r,* 266

VENDOR'S LIEN.

WHEN ENFORCED.

1. *Notice.*—Appellees having actual notice of the unpaid purchase money, and having assumed to pay it, whether the mortgage is a good contract in equity, or an absolute nullity, there is a vendor's lien here for an amount which they have agreed to pay, and equity and good conscience require that they should do so. *Thompson v. Scott et al.,* 641

VENUE.

IN LOCAL ACTIONS.

1. *When suit may be brought in either county.*—Where an injury has been caused by an act done in one county to land situated in another, the venue may be laid in either. *Pilgrim v. Mellor,* 448

WAREHOUSES.

DELIVERY OF GRAIN TO.

1. *When delivery may be compelled.*—If the place of consignment can be reached by any track of which the railroad company is the owner or lessee, or in the lawful use, or which can be lawfully or rightfully used by it, the company is bound to deliver at that place. *C. B. & Q. R. R. Co. et al. v. Hoyt et al.,* 374

2. *Cannot compel delivery over track of another company.*—Where a portion of the track over which the railroad company must run its cars in order to deliver grain at the warehouse in question, belongs to another company, and the right to its use has not been obtained, the company cannot be compelled to make such delivery. *C. B. & Q. R. R. Co. et al. v. Hoyt et al.,* 374

RECEIPTS.

3. *Transfer of title by.*—Where the evidence showed that grain had been delivered from the warehouse and the warehouse receipts surrendered to the warehousemen, an instruction to the effect, that if the jury believe that the warehouse receipts in evidence were not held by the plaintiffs at the time of the levy of execution in question, but had been surrendered to the warehousemen prior to that time, then the plaintiffs are not entitled to the property replevied, is erroneous. If the real reason of the surrender of the receipts was the delivery of the grain to plaintiffs, they were entitled to the grain, because they had once held the receipts and had surrendered them for grain delivered in exchange therefor. *Nelson v. McIntyre,* 603

WAREHOUSES. *Continued.*

GENERALLY.

4. *Rights of owners—Control by majority.*—The right of a majority in interest in the business of a public warehouse to exercise control in utter disregard of the rights and wishes of the minority cannot be conceded. *C. B. & Q. R. R. Co. et al. v. Hoyt et al.*, 374

WITNESSES.

IMPEACHMENT.

1. *To what time testimony should relate.*—It is not an imperative rule that impeaching testimony should relate to the character of the witness for truth and veracity at the time and place where he lived when he gave his testimony. *Brown v. Luehrs*, 74

(C. C. R. R. Co. v. Hoyt et al.)

